IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS, ET AL	)	
	)	
	)	CIVIL ACTION NO.
VS.	)	B-14-254
	)	
UNITED STATES OF AMERICA, ET AL	)	

PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE ANDREW S. HANEN
JANUARY 15, 2015

APPEARANCES:

For the Plaintiffs:
MR. ANDREW STEPHEN OLDHAM
MR. ADAM NICHOLAS BITTER
MS. ANGELA V. COLMENERO
MR. ARTHUR D'ANDREA
MR. JONATHAN F. MITCHELL
Texas Attorney General's Office
P.O. Box 12548
Austin, Texas 78711

For the Defendants:
MS. KATHLEEN R. HARTNETT
MS. KYLE R. FREENY
US Department of Justice
Civil Division
950 Pennsylvania Avenue
Washington, D.C. 20530

For the Defendants:
MR. DANIEL DAVID HU
U.S. Attorneys Office
Houston, TX

Transcribed by:
BARBARA BARNARD
Official Court Reporter
600 E. Harrison, Box 301
Brownsville, Texas 78520
(956)548-2591

THE COURT: Thank you. Be seated, please.

Good morning. Welcome. You'll see that we were trying to figure out what would make our visitors from the north and from the east feel at home. And I'm sure our Mayor Tony and the Chamber of Commerce got together with the weatherman and got us frozen rain to make everyone feel comfortable.

Let me go over kind of a little bit of groundwork before we start. First of all, I appreciate everybody's cooperation with no kind of photography or recording here in the courthouse. Sometimes I know a lot of people say, well, why do you -- what is the reason you do that?

Well, in this courthouse especially, we have a lot of confidential informants, defendants who are cooperating with the government. We have a very -- a number of people that if somebody were taking a photograph of them, those individuals or their families would be immediately in danger from some of the cartels, and so we appreciate everybody's cooperation in that.

Secondly, I appreciate the lawyers for the state for coordinating with the other states in their presentation. I asked them to do that when we had kind of a preliminary phonecall.

And I will ask everyone when they speak, at least for the first time, to, one, speak from the podium, and also identify yourself.

There are a couple housekeeping matters. The government has

filed a motion to file a -- another brief, and we'll probably need to talk about the timing of that. And I -- Cristi informed me that we may have another plaintiff joining, and we'll talk about the timing of that too and whether it matters.

With that, let me also go over just a couple things that -- and I don't want to impact anybody's presentation as they want to make it. But I will say that talking not just to me, but to anyone in Brownsville about immigration is like talking to Noah about the flood, both in legal terms and in practical terms. So, I mean, we're the spearhead of the spear. If there's any tip to it, we're it.

And by that, we've seen the upsides of -- and downsides of strict enforcement of immigration laws. I mean, as a judge, I'm compelled to sentence people who are here illegally at times when I think all they are are trying to make a better life for their family, and that's kind of a downside. We see the upside of it. We see -- just last week we swore in over 100 new citizens. And we swear in thousands of new citizens a year here, and we get pleasure out of that.

We see the upsides and downsides of what some people might describe as a lax enforcement policy. I mean, we -- probably in the circumference of just several miles around this courthouse, we probably have thousands of illegal aliens that are living and doing nothing more than supporting their family and raising them and trying to make a better life for themselves, but we've also

seen some of the crimes that are committed. I mean, just earlier this fall, we had a Border Patrol agent shot and killed in Willacy County allegedly by illegal aliens. So, I mean, there are upsides and downsides about that, and we see that.

I'm not trying to impinge on either side's presentation, but I'm just telling you we -- you know, we're kind of where the rubber hits the road down here, so we see it.

I would also like to add that as far as the Court is concerned, and I think truthfully as far as the public is concerned, there aren't any bad guys in this. In fact, the president has actually said this in some of his statements that, you know, people can have legitimate views both ways. And, quite frankly, I think if you took a poll of most people, they would feel strongly both ways on some of the issues that are going to be presented here.

But no one -- you know, no one is a evil person. No one is Xenophobic. I mean, this is an area of legitimate debate, and I wanted to make that clear. In fact, it was -- far be it from me to frequently quote John Stewart, but John Stewart had an interesting comment the other day following the tragedy in Paris where he said, you know, this is a stark reminder that we jab and ridicule politicians and various people, and we go back and forth and back and forth, but it's a conversation among what he called team civilization. And the good news about this, and, quite frankly, good news, we have some people out in front of

the courthouse protesting. The good news is you're allowed to do that here. And in a lot of communities, you wouldn't be allowed to do that. In a lot of countries, you wouldn't be allowed to do that.

Having said that, though, let me bring up one other thing. And the government put this in their brief. And by "the government," I mean, everybody here is a government, but I refer to the state, and "the government" being the federal government.

The government quoted a 10th Circuit case in their brief that basically said that you're not supposed to convert the federal courts into a public-funded forum for the ventilation of public grievances. And I thought that was an eloquent way of stating that the Southern District of Texas, we're not the complaint department. You know, we're not -- just because somebody has a problem with Congress or somebody has a problem with the Executive Branch, I mean, we're open for business for cases and controversies, but we're not where someone necessarily goes to ventilate about your latest disappointment.

You know, people are welcome to do that. And that's the great thing about this country is you can do it. But probably -- you know, you probably want to go down the street to the Vermillion and do it over a beer and nachos with somebody, but not necessarily here in this courtroom. I mean, with apologies to our friends from Wisconsin, if this Court had the power to dictate certain things, I mean, J.J. Watt would be the

most valuable player in the NFL, but I'm probably guessing that Aaron Rodgers is going to be.

So keeping with that in mind, the way I look at this -- and I'll let the parties correct me if they think I'm off base on this. We're talking about legal issues. We're talking about standing, we're talking about constitutionality, and we're talking about legality under the APA. And those are the issues that I want to focus on. And I'm willing to focus on anything else that any of the lawyers think I'm missing, but I want to concentrate on those because I think those are the issues I'm going to be ruling on.

All right. I think the -- what I'd like to hear initially -- and again, I know at least the state has a presentation and a PowerPoint and everything. Let me start with you. Mr. Oldham, will you identify yourself and the people at your table maybe?

MR. OLDHAM: Yes, Your Honor. Good morning. Andrew Oldham from the Office of the Attorney General of Texas appearing today on behalf of the plaintiff states. With me at counsel table, Arthur d'Andrea, Angela Colmenero, Adam Bitter and Jonathan Mitchell, all from the State of Texas.

THE COURT: All right. And do we have -- is there someone else going to appear for any of the other states?

MR. OLDHAM: No, Your Honor. In response to the Court's request, I will be presenting on behalf of all of us.

THE COURT: All right. Mr. Hu, I'm going to pick on you since I know you. Introduce yourself and the folks at your table.

MR. HU: Daniel Hu, Assistant United States Attorney. With me is Kathleen Hartnett from the Civil Division in Washington who will be presenting argument on behalf of the United States, and Kyle Freeny, also from the Civil Division in Washington.

THE COURT: All right. Mr. Oldham, my sense of things would be to start with you and say tell me how you get here. And by "here," I mean why do you have standing to bring this lawsuit? I don't want to impact -- if you want to work your way through your PowerPoint, I'm welcome -- you're welcome to do that, but that's the issue I first want to focus on.

MR. OLDHAM: Yes, Your Honor. Happy to start. Happy to start with standing. Happy to start with the PowerPoint or with housekeeping, whichever would be --

THE COURT: Well, let's do housekeeping last.

MR. OLDHAM: Great. So why don't we start with standing. And when we get to that point in the presentation, we can skip through it at the Court's convenience.

But the State of Texas and the other plaintiff states that are represented before the Court today have standing for three independent reasons. The first is direct economic harm. The second is what we call Massachusetts style injuries. Those are

injuries to the states' healthcare systems, the states' law enforcement programs, and the states' educational programs, all of which the Supreme Court in the *Massachusetts versus EPA* case, which was the greenhouse gas regulation case from 2007, countenanced as legitimate bases for states to invoke the jurisdiction of the federal courts.

And then the third and final is what we call parens patriae standing, and the leading case on that is the *Alfred L. Snapp* case in which the Court said that the Commonwealth of Puerto Rico could invoke the parens patriae standing to come into federal court and to vindicate the economic well being and the economic interests of its residents.

So all three of those are independent bases for standing. They all apply to the plaintiff states. And in order to dismiss this case for lack of jurisdiction, the United States would have to persuade this Court that all three of those are lacking.

So we can walk through the first -- I'm happy to go to the slides, or we can --

THE COURT: However way you want to approach it is fine with me.

MR. OLDHAM: That's great.

Why don't -- for the Court's convenience, why don't we -- we can walk through the slides, and if -- and standing is obviously the first substantive issue that we'll deal with, and we can come back if we need to.

THE COURT: All right.

MR. OLDHAM: Your Honor, if I might, I'd like to begin by acknowledging what the Court said at the opening, which is we realize that this is a case that does tread on a policy dispute, but we are not here today to talk about policy disputes or to take a position on what would be a good law if Congress passed it through the bicameralism and presentment and if the president signed it into law. What we're here today to talk about is a legal issue that goes to the foundation of this country, the foundation of the Article I and Article II and Article III, separation of powers.

The question presented in this case is whether the president can unilaterally suspend the federal immigration laws, unilaterally create a massive new federal bureaucracy for processing and approving deferred action applications, unilaterally hand out millions of federal authorization documents, and then cloak that entire new federal operation from judicial review by any plaintiff in any court at any time by calling it executive inaction. And the states and officials representing one half of this country submit to the Court that the president cannot.

Now, this case, as the Court acknowledged, involves the federal immigration laws. But as we've explained in our papers to a deafeningly silent response from the United States, if this president can do this, then the next president can do the same

thing with the tax laws, with the environmental laws, with the workplace protection laws, really with any law. And if the defendants have their way, the federal courts will not now or ever have a chance to decide whether that unprecedented conception of executive power can be squared with Article II of the Constitution or the Administrative Procedure Act.

On the other hand, a preliminary injunction merely will preserve the status quo, both in terms of the constitutional separation of powers and federal law. A preliminary injunction will give the 25 plaintiff states a day in court, and a preliminary injunction will vindicate a principle that is literally as old as *Marbury versus Madison*; namely, that the president does not get to decide what the law is.

Now, there's been a lot of paper filed in this case, and the United States has promised to file more. So I'd like to take a step back and talk about the bigger pictures and walk through about what this case is about, what it's not about, and why a preliminary injunction should issue.

And I think the first and most important point is to explain that this is a case about action; executive action, not executive inaction. And the United States has done a lot in this case I think to conflate these two concepts. So at the very beginning, I'd like to clear them up and make sure that we're very clear about what the state is challenging and what the state is not challenging.

This goes back to the policy debate that Your Honor mentioned at the beginning. Then, of course, we'll answer the -- any questions that the Court could have about standing before turning to our two causes of action, the Take Care Clause and the Administrative Procedure Act. We'll also talk about the other preliminary injunction factors that the Court has to consider, and then the states' proposal for what the injunction should look like.

So first, what do we mean by executive action? The states in this case are aggrieved by actions that the Executive Branch has taken, actions that the Executive Branch is currently taking; and for purposes of the preliminary injunction, we are aggrieved by the actions that the president and the defendants have promised to take. So what are they?

The first one is unilateral lawmaking. As the Court knows and as the Court referenced earlier, the immigration laws are complicated. They're complex. They've existed since at least 1952. They've survived through 11 presidential administrations. They spanned hundreds of pages of the United States Code and thousands of pages of the Code of Federal Regulations.

And in this case, the defendants have taken all of that law and they have put it aside, and they have replaced it with a six-page DHS directive that applies to 40 percent of the nation's undocumented population. And it's our position that that is an unlawful exercise of unilateral lawmaking.

They've also created a new federal bureaucracy that processes forms that look like this. This is the I-821D that the defendants have used for the DACA program and promise to use a similar, if not identical one, for the new program. They've opened new service centers or are in the process of opening new service centers, hiring thousands of federal employees to process people. They'll promulgate new standard operating procedures on how to approve these applications, and then they'll hand out application approvals.

Again, those are things that the defendants are affirmatively doing, not things that they're not doing. So we're complaining about the actions that they are taking.

After the 821D process, the defendants are going to hand out millions of employment authorization cards. They look like this, not unlike a driver's license. Again, separate application process, separate approval process, separate standard operating procedure process, approvals and cards issuing. Again, these are things they're doing, aggrieving the states as we'll discuss in just a second, and things that we're asking to be enjoined.

At the end of the EAC process, the defendants are then doling out government benefits, and there are many of them at both the federal and the state level. Again, these are things the defendants are doing, not things they're not doing.

So, for example, federal work authorizations, those EAC

cards that we just looked at, will give millions of people the opportunity to work lawfully that they did not have before. They will also give out Social Security numbers, Social Security benefits, Medicare benefits, myriad tax credits, including the earned income tax credit.

THE COURT: What proof do I have of that?

MR. OLDHAM: The defendants' own documents, Your Honor. All of these things are on -- are things that the defendants have either admitted to doing under DACA or promised to do under DAPA or the 2014 DHS directive. They're in the preliminary injunction papers. Pages 12 and 40 of the defendants' opposition to the preliminary injunction, they've admitted that they will do these same things for the new program.

They will also get privileges to travel as they did under DACA, unemployment insurance and state licensing. So again, all of these things that you see here are things that the defendants are affirmatively doing, and they have to have lawful authorization to do these things.

THE COURT: Don't they have some statutory authority for allowing individuals to work?

MR. OLDHAM: Your Honor, the -- yes, they do have statutory authorization to allow individuals to work. It is our position that they do not have statutory authorization to do this. And, in fact, it's the existence of the statutory authorization that proves that they don't have this authori --

that they don't have the ability to do what they're doing because there's nothing in any of the provisions -- and we'll show them to the Court later. There are, by our count, approximately 27 separate statutory provisions passed by Congress and signed by the president that govern the lawful presence of parents for U.S. citizens, the lawful presence for parents of legal permanent residents, and the lawful provision of work authorizations. And not a single one of those says that the President of the United States can extend a work authorization -- or the defendants in this case can extend work authorizations to people who are not here lawfully.

So just take one example. The defendants have cited in their papers Ts and U visas. For T and U visa applicants, those are actually statutorily authorized to get deferred action, and they're also statutorily authorized to get work permits. But if you don't have the visa, if you don't -- if you're not in the process of or already having received some lawful immigration status, there's nothing in the statutory code that allows the defendants to grant work authorizations in those circumstances, much less is there something in a mountain of restrictions that authorizes them to grant work authorizations to 40 percent of the nation's undocumented population.

And so those things, all of these things, the affirmative actions that they are taking, which is our position they're not lawfully authorized to do, are the things that we're seeking to

enjoin.

So why are we entitled -- I'm sorry. I should say what we're not here to talk about, the things that this case is really not about. You're going to hear from the United States today things like enforcement priorities; that they're going to accuse us of interfering with their enforcement priorities. They'll accuse us of interfering with their prosecutorial discretion. They may reference the *Heckler versus Chaney* case, which is a case in which the FDA decided not to bring an enforcement action for a mislabeling of a particular drug. And you're going to hear them -- they may even bring up again what they said in their PI opposition, that they accuse the state of -- or the states of commandeering federal enforcement prerogatives or taking a radical position that all undocumented aliens must be removed.

These are not our positions. Every single one of these is a red herring, and none of this is what this case is about. This case is about executive action. It's not about executive inaction.

And so we're here today to ask for a preliminary injunction that prohibits them from doing the things we say are unlawful. We're not asking this Court for an injunction that requires them to do things like this.

So why are we entitled to an injunction? The first, as the Court referenced, is standing. And these are the three points

that we had mentioned at the very beginning, the three bases for the states' standing: Direct economic costs to the states, Massachusetts style costs, and then the parens patriae injuries. And, of course, all three of them are independent. All three of them must be defeated for the state to be -- the states to be dismissed.

So let's start with licensing. Now, as we've explained in the papers, the DHS directive is going to impose significant costs on the states, and one of the most vivid is licensing. So take, for example, the State of Texas. The facts at law with respect to our state are contained in the Joe Peters' declaration. As Mr. Peters explained, if someone shows up at a Texas DPS office with a card from the Department of Homeland Security that says that they're, quote, authorized to be in the United States, which is the statutory term in the State of Texas, then they're entitled to get a driver's license.

THE COURT: Why?

MR. OLDHAM: They're entitled to get a driver's license, well, for two reasons. One is what the statute says; and two is what the United States says. So the statute says "authorized to be in the United States."

THE COURT: Which statute?

MR. OLDHAM: I'm sorry. I'm referring to the Texas Transportation Code which says that if you're authorized to be in the United States, then you are authorized to get a driver's

license, and the state does not have the discretion to refuse it.

So that's what our statute says. And so --

THE COURT: Wouldn't the government consider that to be a self-inflicted injury?

MR. OLDHAM: That's exactly right, Your Honor. That's exactly what they have said. They have said -- presumably the theory of their self-inflicted injuries is they say if you look at these costs, Your Honor, on the right-hand column, 155 to about $199 per driver's license. They say: Well, the State of Texas has chosen in its Transportation Code to give driver's licenses to individuals who show up with EACs, and the State of Texas presumably could choose not to.

Now, that is a deeply troubling argument for two different reasons. First, it's definitely not true for at least three of the plaintiff states. The State of Arizona, the State of Montana, and the State of Idaho all reside in the United States Court of Appeals for the Ninth Circuit's jurisdiction. And in that court, Arizona tried to do exactly what the United States has said they could do; namely, they changed their driver's license policy. They had a new policy that said if you show up with these deferred action documents that we think are unlawful, we're not going to give you a driver's license.

And the United States -- this is the brief. It's in the appendix to the PI reply -- went to the Ninth Circuit and said:

You cannot do that. They said -- this is the quote from the brief. "That's conflict preempted by federal law, and the State of Arizona should not be free to avoid the injury."

So it would be quite an odd self-inflicted injury if the State of Arizona both can be faulted for doing it and is prohibited from avoiding it.

Now, even outside of Arizona and Montana and Idaho, all of which are in the Ninth Circuit, all of which are bound by that decision that the United States helped win, the rest of us, Texas and the other plaintiff states, are also injured in their driver's license programs even though they're not technically bound by what the Ninth Circuit did. Because even if it were true that the United States was right that these are self inflicted and that we could tomorrow snap our sovereign fingers and get rid of our driver's license policies, forcing us to do that as a price of avoiding of penalties associated of giving out the driver's licenses is itself an injury. It's an injury to the sovereignty of the state to force it to change its laws.

So, for example, if you think about the *Alfred L. Snapp* case. The Supreme Court of the United States said that the most solemn act that the state has is creating and enforcing its legal code. And injuries to its creation and enforcement of its legal code are injuries to the sovereignty of the state that create Article III jurisdiction and allow the state to come to federal court and to complain about infringements on its ability

to create and enforce its legal code.

So next I want to talk about our second basis for standing. This is Massachusetts style costs that we referenced at the beginning. As the Court will recall in the *Massachusetts* case, the Supreme Court of the United States said that states get, quote, special solicitude in federal standing analysis. And the reason for that, the Court said, is because when the states joined the union, they had to give up certain rights of sovereignty, like the right to enact their own clean air laws or, as in this case, the right to enact our own comprehensive immigration system.

One of the things we got in return for giving up those rights of sovereignty is the right to come to federal court and to complain about infringements on state sovereignty.

So in the *Massachusetts* case, for example, the Supreme Court said that the State of Massachusetts could go and sue EPA in federal court to force EPA to regulate carbon emissions from new cars sold in the United States. And the basis for that conclusion, the Supreme Court said, is because Massachusetts should be allowed to string together the following set of inferences. Carbon emissions increase greenhouse gases. New cars emit carbon; and therefore, too many car-based carbon emissions will contribute in some way to greenhouse gases that will raise the global sea level and, therefore, diminish Massachusetts' coastline.

Now, the entire basis for that set of assumptions and contentions is this declaration which is taken from *Massachusetts versus EPA* case from a guy -- from a scientist named Michael MacCracken. And Michael MacCracken based his entire analysis on the following paragraph. This is what he said about EPA's regulation of greenhouse gases.

If EPA regulates greenhouse gases, quote, this would discernibly and significantly reduce and delay projected adverse consequences of global warming and greatly improve the likelihood that there would be time for additional development and use of even better technologies. With such efforts accompanied by programs in limiting other emissions, presumably non-carbon and non-greenhouse gas emissions, it would be much more likely that the extent of climate change could ultimately be limited to levels that would avoid the most serious impacts of global warming.

So that string of influence and speculation as to the connection between what the EPA was doing in that particular regulation and the effects on Massachusetts' coastline supported the state's standing to come and bring a grievance about something as big and generalized as global warming.

THE COURT: Well, doesn't the statute, though, provide a means -- specifically provide a means for people to question the enforcement of certain air pollutant standard?

MR. OLDHAM: The Clean Air Act. If the question is does

the Clean Air Act provide a right of action, it certainly does. But that's not the question that MacCracken was talking about, and it's not the question that the *Massachusetts* case was talking about.

THE COURT: No. But I meant --

MR. OLDHAM: I'm sorry.

THE COURT: -- aren't I going to hear: Judge, the *Massachusetts versus EPA* case is all great and everything and we know what it says, but in that case, because the act provides a means, a specific means to contest federal -- now the act, I think, says federal action. It doesn't say inaction, but that was technically inaction. You don't have an act here that gives you that privilege.

MR. OLDHAM: So two points in response, Your Honor. One is that, of course, the relevance of *Massachusetts* is the -- is whether Massachusetts had Article III injury to come into federal court, invoke jurisdiction. So whether the statute said this, that or the other thing would be irrelevant to that. Massachusetts has to show -- in addition to having a statutory cause of action, it has to show the irreducible constitutional minimum of Article III standing.

So, you know, you're right. The Clean Air Act has a special provision, and this is not a Clean Air Act case. We do have a statutory right of action, both to raise the Take Care Clause claim, namely Section 1331, and also to raise our APA claims,

namely Section 704 of the Administrative Procedure Act.

So we have causes of action, but the relevance of this in MacCracken and all of the discussion about greenhouse gases and eroding Massachusetts coastline goes to is the state injured, right? And the fact that, you know, whether there's a statute or there's not a statute is a separate question.

And so we would submit that the United States -- you're right, that is the United States' response to *Massachusetts*. And we would submit that it's quite a feeble one, and it's nonresponsive to really what's going on in *Massachusetts*, which is, is the state injured? And they said yes. And can the state therefore go into federal court? And the answer to that has to be also yes.

And we would submit to you that our case is dramatically easier than what Dr. -- I'm sorry, what Mr. MacCracken did in *Massachusetts* and what the Commonwealth of Massachusetts was able to show with respect to greenhouse gases.

So in this case, we have the declaration of Dr. Eschbach, who is a demographer who has talked about the fact that undocumented immigration is a function of two different variables. One is undocumented people coming to the United States. And two is undocumented people who are in the United States leaving the United States.

And on both of those variables, what the defendants have done in this case increases net undocumented immigration, both

because folks who are here and receive benefits under the new program will be more likely to stay. And because under -- I take it to be a well-established principle of demography, when governments pass -- when governments use programs like we're talking about here, like the -- no different really than the IRCA statute from 1986, it induces additional people to come to the United States illegally. And when net undocumented immigration goes up, as Dr. MacCracken has said that it will, that will impose dramatic costs on the states in terms of healthcare, law enforcement, education and others that are specified in the briefs.

And we think that the causal connection between authorizing the presence of millions of people, as the defendants have purported to do, is much -- I'm sorry, that and the injuries to the state are much tighter, much easier, much more judicially cognizable than the connection between EPA's regulation or failure to regulate greenhouse gases and the erosion of Massachusetts' shoreline.

THE COURT: Well, doesn't the action they're taking, though, I mean, it only effects people that are already here, at least in theory.

MR. OLDHAM: So as to the people who are already here, as Dr. MacCracken points -- I mean quantifies, those people become dramatically less likely to leave. You know, every given year there's a certain amount of flow, people coming, people

going. But once their presence is authorized, once they have work permits under the -- under the DHS directive that's challenged in this case, they're obviously dramatically less likely to leave.

And so if you only thought about the folks that are actually directly affected by the policy, that itself is much more concrete than what happened in the *Massachusetts* case. And Dr. MacCracken goes even further and says that it's not just that. It's also the incentive to have new people come, just as happened after 1986.

So if the Court will recall, in 1986 Congress passed an amnesty program called IRCA. And the demography literature is well established that after 1986 when there was a large scale amnesty program, that was approximately 3 million people. This is even bigger. It incentivized new people to come without authorization.

So we think that the *Massachusetts* standing is quite compelling. And I think if any doubt on sort of how compelling the *Massachusetts* standing argument is could be resolved by exactly the Court's observation earlier, which is that the United States' only response to all of this is a nonresponsive one which is to talk about a statute, not to talk about the Article III injuries that the states have incurred.

Third and finally, I'd like to talk about parens patriae standing. So again, this is a third independent basis for

standing that the states have established and that allow the states to invoke the jurisdiction of the Article III courts.

This is the *Alfred L. Snapp* case, and it's the canonical leading case on parens patriae standing and the ability of states to invoke federal jurisdiction on this ground. And in the *Alfred L. Snapp* case, the Commonwealth of Puerto Rico was allowed to come to federal court and complain about economic discrimination against its workers.

In that particular case, they were citizens of Puerto Rico who wanted to go work in apple orchards in Virginia, and they were denied employment opportunities. And the Commonwealth of Puerto Rico sued to vindicate the rights of approximately 700 workers. Approximately 700.

And the Supreme Court said that the state has a quasi-sovereign interest in the health and well-being, both physical and economic, of its residents in general. And the Court said that because Puerto Rico alleged that the petitioners -- the petitioners there are the apple orchards -- had discriminated against Puerto Ricans in favor of foreign laborers, and because those Puerto Ricans were denied the benefits of access to domestic work opportunities, that the INA -- again, our statute -- was designed to protect, they had standing under the parens patriae doctrine to come to federal court for a resolution of their grievances.

And that same reasoning extends to this case. Because as

Dr. Welch has explained in the Welch declaration, again, in the plaintiffs states' appendix, we have the exact same type of discrimination here in the sense that the defendants' work authorizations will make it more expensive to hire United States citizens versus similarly situated non-U.S. citizens. So that economic discrimination is sufficient to allow the states -- and this applies to all of the states -- to come to federal court for resolution of their grievances. Those three --

THE COURT: And can they do that in a suit against the federal government?

MR. OLDHAM: Well, yes, Your Honor. So this is actually -- this is -- was an interesting dispute. The United States points to a footnote in the *Snapp* decision that says, well, of course, you can't bring parens patriae actions against the United States government. And that was, of course, the exact position that the United States Department of Justice raised in the *Massachusetts versus EPA* case. They pointed to that and they said to the United States Supreme Court, well, what about *Alfred L. Snapp*? And it says you can't bring parens patriae actions to -- against the United States.

And the Supreme Court emphatically rejected it. Justice Stevens, writing for the majority, said whatever -- whatever law that -- whatever the vitality of that footnote in *Alfred L. Snapp* used to have, it obviously doesn't have it now because Massachusetts got to sue EPA just like the plaintiff states are

suing the Department of Homeland Security.

And it's also crucial to realize what Justice Stevens said for the *Massachusetts versus EPA* majority. What he said was when *Alfred L. Snapp* includes this footnote about bringing parens patriae actions against the federal government, what it's saying is, states are not allowed to sue the government to protect their citizens from operation of federal law, right? That's basically the supremacy clause. The supremacy clause makes federal law applicable to the states' citizens, so you can't use parens patriae to challenge that.

But that's, of course, not what we're doing here. We are doing the exact opposite. The plaintiff states want the protections of federal law. The federal law that is duly enacted and codified in Title 8 of the United States Code and codified in the Code of Federal Regulations contains myriad protections for the states. We've relied on that for decades. And it's exactly because those protections should apply to us and the defendants have dispensed with them that we're aggrieved.

So it's not only is the footnote that they've relied on from *Alfred L. Snapp* all but overruled, if not explicitly overruled in *Massachusetts*, but the rationale that the Court gave for reaching that result applies directly to us.

So we would submit that all three of these are independent bases for standing and that the states therefore have it.

So what about net effects? On Monday, 12 states filed an amicus brief, and they said states are not injured on net by the defendants' actions in this case because in their view, in the amici states' view, all immigration, no matter whether it's legal or illegal, benefits everyone. And it is ironic that one of the states that joined that brief is the Commonwealth of Massachusetts, because in the *Massachusetts* case itself, the Supreme Court said that net effects are not the relevant legal standard.

So in that case, in the *Massachusetts* case, EPA had argued that Massachusetts was not injured because whatever benefits they might hope to gain from regulating greenhouse gases in the United States would be dramatically swamped by increased emissions of greenhouse gases in other places around the world like India and China. And so this is what the -- this is what the EPA had said. "That is especially so" -- right? That is that the states aren't injured -- "because predicted increases in greenhouse gas emissions from developing nations are likely to offset --

THE COURT REPORTER: A little slower.

MR. OLDHAM: Oh, I'm sorry.

THE COURT: This is my governor for when you get talking too fast. She cracks down.

MR. OLDHAM: Yes, sir. "That is especially so," EPA argued, "because predicted increases in greenhouse gas emissions

from developing nations, particularly China and India, are likely to offset any marginal domestic decrease."

And the Supreme Court responded to this argument, this offsetting benefits argument from the United States -- from the Department of Justice in the *Massachusetts* case by saying EPA overstates its case. Proceeded to say it doesn't matter if the benefits are going to be swamped by some offsetting effect. What matters is that the Commonwealth of Massachusetts could say one molecule of increased -- I'm sorry, one molecule of carbon emissions in the EPA carbon emissions regulation injures us or at least contributes to the injury that we suffer; and therefore, every reduction of every molecule is an Article III redress -- is an Article III redress for injuries.

So the Supreme Court let it go there. And it's not just Supreme Court law, it's also true in the Fifth Circuit. So if you take, for example, the *Gilbert versus Donahoe* case, which can be found at 751 F.3d 303. In this case, the Fifth Circuit said that net effects are not the relevant question for determining whether and to what extent a plaintiff has suffered an Article III injury.

So the Fifth Circuit described the facts of the case this way. Donahoe, who is in this case the defendant, contends that Gilbert, who is in this case the plaintiff, failed to provide any documentation regarding the extent of her damages. And even if she could prove damages, they would not provide redress

because any award would be offset by the $15,000 the plaintiff had already gotten.

And the Fifth Circuit said that contention concerns whether Gilbert has stated a claim for which relief may be granted. In this case it was a claim for money damages. So the question is whether she actually had a damages claim, not subject matter jurisdiction.

So in our view, net effects are not the relevant question. The Supreme Court has emphatically said it. The Fifth Circuit has emphatically said it. And the plaintiffs, therefore, have three independent bases for standing: Direct economic harm, *Massachusetts* style harm, parens patriae harm, all of which allow the plaintiffs the right to invoke the jurisdiction of the federal courts to resolve this crucial matter of constitutional law.

Turning to the merits. The states have --

THE COURT: Why don't we wait on that, if it's all right, and let me get Ms. Hartnett or whoever, the government's designee to respond to standing. Why don't we go ahead and do it now.

MS. HARTNETT: Thank you very much, Your Honor.

At the outset, I would just say that the state has the inquiry at issue somewhat backwards to the extent that the state is suggesting that it's our burden to disprove three types of standing. It's the states' burden on both the motion for

preliminary injunction and, frankly, for purposes of whether there's Article III standing to maintain the case in the first place. It's the states' burden to prove the elements of standing, and that's settled, settled law.

And taking the state's presentation in turn, it has failed to establish any of the required elements for Article III standing here. And there's also prudential considerations that would be at issue that come into play and further support the lack of standing here.

At the outset, I would note that only three of the states have even attempted to show some sort of an evidentiary basis for their standing. That's not really dispositive here because at the end of the day, it's really the legal theory of standing that's insufficient, but I just wanted to point that out.

I would say there's at least two overarching -- I'll directly respond to some of the comments that the state has made, but I -- taking a step back, I just wanted to set forth what I thought are two overarching principles that frame our understanding of the standing at issue here and this unique situation of a state trying to sue the federal government for a policy that is going to have an indirect economic effect on the state.

And the first principle is something set forth in our brief that's not unique to states. But in general, there's no standing to complain about the prosecution or lack thereof of a

third party. And we cited the Supreme Court's decision in *Linda R.S.* for that principle. It's definitely a different context in that case. That was a child support case about a person that was unhappy with the state not bringing a prosecution action against somebody who was the father of the child at issue.

So I agree the facts of that case are different, but it's part of a more general principle that in general, there's not standing to complain against the government for the failure of a prosecution or whether they basically regulate or not regulate someone else. And that's also set forth in the *Lujan* case, the Supreme Court case where they talk about being a heavy burden to establish standing if you're complaining about the unlawful regulation or the lack of regulation. It's just a --

THE COURT: Let me ask you, does it make a difference, though? I mean, the United States two years ago took Arizona to court and said -- because Arizona had passed some laws that they deemed appropriate to protect their citizens. And the United States said: Arizona, you can't do that. We are the supreme -- you know, under the supremacy clause, immigration matters are in our bailiwick, and you can't interfere with that.

And the Supreme Court bought that in no uncertain terms. I mean, the language is clear that they said: No, this is federal government. This is federal government. This is federal government. This is federal government.

So what happens when the federal government says: You know,

it's our bailiwick. We're going to -- but we're not doing it. We're abdicating. We're completely -- we're not -- we know what the law says. The law is telling us to do this, but we refuse to do it. And, oh, by the way, state, you can't protect yourself because it's our job to do it. And even though we're not doing the job, we're going to let them do it. We're not letting you do it, I mean.

MS. HARTNETT: Well, Your Honor, that's not what's happening here. I guess I would just say that to begin with, and I'm happy to discuss further --

THE COURT: Well, wait a minute. Why isn't it what's happening here?

MS. HARTNETT: Well, Your Honor --

THE COURT: Let me --

MS. HARTNETT: Please.

THE COURT: Let me ask, because -- and I'll let you respond because I want you to. I mean, the statutes say that undocumented aliens shall be deported, okay? And this program is saying we're not deporting them at least for three years. So you're clearly not doing what the statute -- and I think the statute says "shall." I mean, I -- we can look it up, but, I mean, it says "you shall do it." And what the government has decided to do is: Well, I know the statute says "shall," but we're not. And, oh, by the way, state, you can't do it either.

MS. HARTNETT: Your Honor, I think there's two different

questions. One is what does "shall" mean and how does that operate? How does that statute operate?

And there's a second question of whether there's been an overall abdication here. And again, I'll explain to you why our position is there clearly has not been.

But just on the "shall" point, it's long been a feature of the immigration enforcement efforts, including against a backdrop of various provisions that say "shall," and I think it includes 8 U.S.C. 1225(a) I think is what you're referring to there, that there's a -- there's discretion even against that background, that backdrop. The Supreme Court has recognized both in the *Triple ADC* case and Arizona that there is discretion at the federal level at every step of the removal process. And in *Triple ADC*, for example, that was expressly about removal. That was about whether to initiate, whether to continue, whether to pursue.

So there's one question about whether there's -- does that actually mean -- do the immigration statutes mean, as the state has argued under 1225(a) and other provisions, that we have to deport every person that we come across and encounter if they even -- if they conceivably could be removed under the law? And I think it's settled precedent under the Supreme Court's reading in *Arizona* and in *Triple ADC* that no, we don't. That shall -- and the -- specifically we make some -- we explain in our brief how the provision they're talking about there really is a -- is

a provision that applies to those who are seeking admission at the border as opposed to the more broad category of people who are applicants for emission, (sic) which includes all the people that are here unlawfully present. So I think that response to the specific contention of whether -- whether the federal government has a legal obligation to deport every person who could conceivably be deported. Now, this --

THE COURT: But the reason I -- and I know we're kind of slopping over into the merits a little bit there --

MS. HARTNETT: Yeah.

THE COURT: -- but the reason I bring it up -- and I'm jumping to, I think, the states' second argument, this parens patriae argument. Because isn't that what *Massachusetts versus EPA* says? And, I mean, in fact, in the dissent by Judge Roberts, doesn't he say it's ironic the Court today adopts a new theory? And the new theory was based on the fact that the federal government has supremacy over a certain area that the states can't regulate. And apparently according to both sides, both the majority opinion and the dissent in *Massachusetts versus EPA*, that means the state has standing.

MS. HARTNETT: Your Honor, as we've explained in our brief and are happy to discuss further, *Massachusetts versus EPA* truly is a different -- a different type of standing, a different theory of standing, and a different reason. It's one of the cases where there's a rare -- the rare situation where

the state is not being directly regulated by the federal government and yet was able to maintain a cause of action.

And I'll point out the most salient -- to begin with, the state -- *Massachusetts versus EPA* did not overrule that critical language in *Snapp* -- in the -- *in the Snapp* case which states very clearly in *Snapp*, "A state does not have standing as parens patriae to bring an action against the federal government."

What mattered in *Massachusetts*, was there Massachusetts was bringing a claim for harm on the basis of its sovereign interest as a landowner. That was the theory of harm in the case. What the EPA was arguing was even -- they didn't concede at some level there was a theoretical effect on Massachusetts, but they were saying that it was too attenuated in order to support a claim of standing there.

And what the Supreme Court found once they were recognizing in the situation of state as landowner being able to maintain a cause of action. They also, as Your Honor directed the state to, that the critical point that there was actually a authorization for this type of action under the Clean Air Act. I'm sorry, the Clean Water Act. In that -- in the -- the language used by the Supreme Court there said that the statutory cause of action was critical, of critical importance to the standing inquiry.

So again, I think they're overreading *Massachusetts versus EPA* to kind of undercut many of the longstanding principles,

which is that a state is not generally able to bring a claim against the federal government for the indirect economic effects, not effects as the sovereign landowner, but indirect economic effects on the state.

THE COURT: Haven't they proven, at least the State of Texas and maybe one other state, haven't they proven direct economic damage?

MS. HARTNETT: No, they haven't, Your Honor.

THE COURT: Tell me why that's true. That's --

MS. HARTNETT: Right. So I guess there's two -- there's at least two theories of economic harm that are at issue. One is the harm that is allegedly flowing from the benefits that would be provided under state law to people who receive deferred action. I think that's one set of economic harms that are being claimed.

At the outset -- I mean, there's several problems with that theory in addition to the theoretical problem of being able to claim a harm based on the indirect economic effects of the federal regulation. But here it truly is the case that these are self inflicted -- I don't mean to be pejorative about that. They're choice -- choices made by the state. There's a federal statute, 8 U.S.C. 1621, that basically stripped all state benefits flowing for certain categories of illegally present people. And then they said to the states: States, if you want to give benefits to those people, you'll have to affirmatively

enact those into law.

And so for example of the driver's licenses and the other state benefits that are being complained of by the three states that have been specific about their complaint, those are all benefits that the state has chosen to give to its -- the people that are in its state based on, in this case, deferred action.

THE COURT: So it's all right with the federal government and y'all are willing to stipulate here today that the states can say: We're not giving driver's license to DAPA people?

MS. HARTNETT: Your Honor, I don't -- yes, with the caveat --

THE COURT: Yes or no?

MS. HARTNETT: Yes, with the caveat that it would depend on how the state did it. I think what's important in the Arizona dream case is that the way that the state in Arizona was doing it was saying: We're going to track. If you're authorized to be present under federal law, you can get a driver's license. And they said: If you have an EAD, the employment authorization card, you can get a driver's license. But then from that group, they carved out and said certain of those EADs we don't accept as true proof of that.

I think what our point for preemption purposes was in that brief is that the state is not free to redefine a category and then in taking --

THE COURT: But they took the category that y'all defined. They used your definition and they say: All right. Anybody that qualifies and got permission to stay in the United States and, you know, use the DAPA, is what I've been calling it, but six factors, we're not giving a driver's license to that person.

I'm not suggesting that's a good idea. I'm just saying does the state have the right to do that?

MS. HARTNETT: As a matter of preemption. There's a separate -- there's a separate claim being made in that Arizona dream case on equal protection grounds that we do not take a position on. But as a purpose of preemption, the federal government's position is that a state could exclude the group of people that --

THE COURT: But you're not willing to say that it violates the equal protection law or it doesn't?

MS. HARTNETT: Your Honor, I just -- I'm here -- I think that we did -- our point is one of -- our interest was one of preemption and making sure that the state wasn't taking a federal immigration classification and redefining it.

THE COURT: But I know. It's the same point, though, you made with the statute you just referenced that strips all the state benefits. It's fine that statute exists, but the Supreme Court has ordered the states to provide education, medical care, all these expenses that they're not being

compensated for.

MS. HARTNETT: On that point, Your Honor, I just want to distinguish that from the other -- from the -- that's not as a -- that's not as a consequence of them being a deferred action recipient, though. That's a critical point. All of the other economic harms are ones that are more based on the presence of unauthorized aliens here in the state. And that's something that we would argue -- we would say that the presentation is simply too -- it is too speculative.

I know Your Honor has expressed, you know, views on the topic of kind of the many causes of having the migratory patterns and the immigration across the border, and it is a complicated --

THE COURT: Well, no. Let me -- let me address that since you brought it up. The views -- and I know the State of Texas cited my own opinion back to me which is always -- a judge faces always with trepidation, you know, when they get cited back to them. But the two opinions that I have written recently that have been critical of immigration policy were both policies that endangered people. They were people -- they were encouraging people to work with the cartels to come into the United States. And if you live in this part of the United States, you know how dangerous the cartels are. In fact, Congressman Vela just wrote a letter to Vice-president Biden about how the cartels have basically wreaked havoc on our way of

life down here, No. 1.

And the other one I wrote is I wrote an opinion that basically said giving asylum or -- this wasn't technically an asylum case, but allowing gang members who have committed multiple felonies to stay in the United States is not a good idea, which the government did. And -- and those are the only two opinions I can think of recently that I have even commented.

Now, I will go one step further and say in both of those opinions, I wrote those opinions after the case, and in both of them I ruled for the government.

MS. HARTNETT: So, Your Honor --

THE COURT: So --

MS. HARTNETT: Well, we're -- I'm aware of that, and I just meant to say that we're aware of your opinions and take them obviously quite seriously. I guess I was also making some reference to -- some comments that --

THE COURT: Well, one of the things that we're charged with under Title 18, United States 3553(a), as your local AUSAs will back me up on this, is that one of the things the government -- the judge has to sit on is we protect the public from future crimes of the defendant, and that's one of our worries. But go ahead.

MS. HARTNETT: No, absolutely. And I was also thinking of some of your comments and questions at the Orly Taitz hearing which were, you know, thoughtful questions about what is -- what

is bringing people across the border, why is this happening. And I -- to your point, though, about the priorities, I don't want to bleed beyond into the merits prematurely, but I would make clear to the Court at the outset, we don't -- jumped right into standing. The reason for this policy is to continue to help focus the Department of Homeland Security's efforts on its priorities. And the priorities are -- are clear. It's to stop the border crossings and to remove the threats to our nation. And those are criminal aliens, national security threats, and other public safety threats.

And, Your Honor, the reason for this -- and we can get into the merits of the program at the appropriate juncture, but I would just say that this entire policy is animated by trying to direct our federal resources in a thoughtful way and a kind of inefficient way, one that doesn't require having to intercept an alien each time and figure out where they belong and how they should be sorted, but rather finding a way to take certain low priority cases that do not provide a public safety threat, put them to the side, and allow the limited resources, resources that would allow us to deport up to only about 400,000 of the 11 million people legally (sic) present and really focus those on the cases that matter most to the safety of the nation.

But just back to standing. I guess just to be clear on the Arizona dream point, because I'm actually not trying at all to be evasive on that point. I think the government's position is

that a state is not required to provide a driver's license to a deferred action recipient, but it would depend on how the state frames that regulation or statute, whether it's actually superseding or otherwise trying to conflict with a federal definition. And in the Arizona case, the problem there was they were saying we'll take everyone who's authorized, except we're going to deem some people not authorized. If they had defined their statute differently, that would have presented a different question, at least for federal preemption purposes.

Just -- I don't -- kind of taking back to -- I had made the general point about kind of whether you have a standing or the uphill battle you would face for standing to challenge the prosecution or lack therefore of another. I think a second general principle which is addressed by some of the material that the states' counsel was addressing is just in general the state doesn't have an ability to complain of an indirect economic effect. And that's both through the parens patriae doctrine. I think it's pretty well established that the state does not have a parens patriae type standing vis-a-vis the federal government.

And then the question is, well, what about if it's an indirect economic effect making some things in the state more expensive? And we've been -- I've been telling you some of my thoughts on, you know, at some level it's a self-inflicted injury, so there's -- that's more of a traceability issue or

causation. But there's also just a more general principle even before whether or not they have to spend more money on driver's licenses if they choose to maintain the law the way it is. It's just that -- the indirect cost of a federal regulation to a state itself is not really a cognizable injury for Article III purposes. And that -- we discussed the *Kleppe* case in our brief as well as the *Hartigan* case.

THE COURT: Does it matter in this case -- and I didn't ask Mr. Oldham this, but I will before we're done today, so -- but I'll start with you because you're -- does it matter, No. 1, we're not dealing with a regulation that has gone through notice and comment? And does it matter, secondly, and it may not have any significance at all, that we're not even dealing with an executive order here? We have nothing, as far as I can tell, from the president. All we have is a memorandum issued by Secretary Johnson. Does -- do those distinctions mean anything?

MS. HARTNETT: I think -- well, for the Article III standing purpose, I think they would have to have an injury no matter what, so that's kind of where we're -- at the outset. I think then there's the *Heckler v Chaney* doctrine that comes into play. I think that properly viewed, as we've explained, and the way that's appropriate to view this, because what is at issue here is a directive of the Department of Homeland Security's secretary, is that this is a challenge essentially under the Administrative Procedures Act, if at all, for whether the agency

action was contrary to law. That's the proper way to view this case. Because otherwise -- and this cuts into the kind of whether this is actually a Take Care free standing claim or an APA claim, any -- any -- any agency action or, you know, an action which someone disagrees with, they could cite the Take Care Clause to the extent they saw that action as not being a sufficient execution of the law.

THE COURT: To raise an APA claim, they would have to prove -- the states would have to prove, one, constitutional standing, prudential standing and APA standing.

MS. HARTNETT: That's correct, Your Honor. And not so -- and I -- lest I didn't -- lest I direct the state to the APA and then immediately say the APA is unavailable, that is the argument here, and it's correct under *Heckler v Chaney* because it is a general statement of enforcement policy. This is not the adjudication of any person's rights or benefits. And at the end of the day, deferred action doesn't even provide a right. It provides a temporary ability to stay here and to work if the -- assuming the employment authorization is granted.

But I think what's important here is *Heckler v Chaney* is an important next step after the standing argument, because what it says is that to the extent that there's an agency enforcement policy, that's within the agency's discretion. And it's not the appropriate subject of judicial review at some extent, with the important exceptions there when you get to the *Heckler v Chaney*

point, assuming you get past standing. And that is both Congress hasn't provided for the discretion in a certain way, that we're not acting contrary to that, and that there hasn't been a total abdication. And I think under both of those tests, which I'm happy to discuss now or after, at the appropriate time --

THE COURT: Let's wait.

MS. HARTNETT: Right. There hasn't been an abdication here.

And I think *Texas versus the United States* I think is an important Fifth Circuit case that I would want to draw your attention to which is kind of bridging the gap between the Article III standing inquiry and between the *Heckler* inquiry.

But there in that case, and it's really quite contrary to what the state is trying to argue here. Real or perceived inadequate enforcement of the immigration laws does not reconstitute a reviewable abdication of duty.

Now, the Texas case was different in that the states there were challenging both Congress and the Executive Branch saying collectively you all weren't enforcing the law correctly. But I think *Texas versus United States*, 1997 Fifth Circuit precedent, supports us both on our standing points and on our point about *Heckler v Chaney*, and that even if there were some arguable Article III injury here, it's just inappropriate for -- in the context of a enforcement policy, for the state to be able to

bring a substantive legal challenge to that under the APA.

I guess one other point I would make just -- I -- I -- I understand Your Honor is likely aware of this, but just to make -- to make sure that our position is clear, I talked about the benefits that would flow under state law through the states' choice to people that have received deferred action and why that isn't a proper theoretical basis for standing, even if there is some actual cost, which again, we were -- understood the basis that today's hearing was not really a chance to get into the -- any kind of factual disputes, so we don't think you need to address any factual disputes.

But also I would just point out with the larger question about whether there would be a larger flow of people in that might get other benefits. That wouldn't be deferred action recipients, but rather just kind of a general influx. Our position on that is that the state has really failed to substantiate that in any concrete way which they would have to do for purposes of standing.

And again, the policies at issue here only apply to people that have been here since 2010. And therefore, it would really be contrary to the face of the policy for someone to come here on the expectation of receiving deferred action because they wouldn't. They would be turned back.

THE COURT: And I assume the next logical extension of that argument is then that any damage that the state -- is

inflicted upon the state by new arrivals is too attenuated from this process to be caused by it?

MS. HARTNETT: That's correct. I mean, there is definitely the first step of speculation which is that somehow these specific policies, not immigration policies at large, but these specific policies, not the 2012 deferred action, but these policies cause some specific influx. But even if you got past that step of speculation, there is an important principle in the case law about the independent actions of third parties. Really at the end of the day, that's a choice, a conscious choice of the alien, as Judge Vela had put it in the *Texas versus United States* case when it was in the district court. And also like *Florida versus Mellon* we cite is an important case where there was some predicted behavior of Florida landowners based on a new federal policy about taxation. And there the Supreme Court said that the standing is lacking because it really just requires too attenuated of a connection to base claimed harms by the state on predicted behavior of people that might be in the state.

I guess I covered most of the -- those are most of our Article III points. There's also a redressability point which I don't want to dwell on too much, but I think it kind of follows from the same point that there's not really a specific injury that's traceable to the policies --

(Court reporter interrupts.)

MS. HARTNETT: Anyway, the point we want to make is that

both on the -- I think for the same reason, there's a lack of actual injury and a lack of causation, the redressability does become an issue as well because it's hard to see how an order enjoining whatever the state is seeking to enjoin -- I noted that the PowerPoint is slightly different than what the presentation was is in the briefing, and we want a chance to respond to that, but that the order of this Court would really not stem a lot of the harms that the state is claiming, particularly the ones related to the broader issues of flow of immigrants.

And then finally we do cite some cases that are important principles of prudential standing. And that would be both the -- you know, the *Valley Forge* case and the zone of interest line of cases that to the extent that this really is an APA claim at the end of the day, the -- and, frankly, even under the immigration laws themselves, those are not the -- the intended beneficiaries or regulated parties in those laws are not the state.

THE COURT: Let me go -- let me talk to you for a minute about that because if -- let's go back to my -- it's not a hypothetical. I guess it's just -- it's a fact. We have a decision from the United States Supreme Court saying that: States, you don't have any business doing anything with immigration. Only the federal government can do that. And that was the position that the federal government took, and the

Supreme Court upheld that position.

So the states are now powerless, if you will, to do anything in that regard. And the federal government, rightfully or wrongfully, decides on a policy that impacts the state. Doesn't that put them, for prudential standing, into a zone of interest? They can't -- they can't fix it. They're stuck with whatever you guys do. Doesn't that give them at least a zone of interest under prudential standing?

MS. HARTNETT: Your Honor, I would -- I don't think so. Actually at the end of the day, the zone of interest, you look at both the APA and -- most importantly here is the INA because those are the underlying legal provisions that are -- kind of would be flowing through an APA claim. And those are really directed as the relationship as between the federal government and the aliens that are being regulated.

And so although I appreciate your point about some incidental effects on the states due to not just these policies, but, frankly, a wide range of federal policies that the state doesn't have standing necessarily to challenge, that does not place them in the zone of interest as a legal matter. I think what the state would need to show is some sort of a concrete harm that was directly traceable to the policy either being directly regulated in some way by the policy which the state is not -- or something more concrete than --

THE COURT: So wonder -- wonder -- let me do this. This

is a hypothetical obviously, but I'm the Department of Homeland Security. I'm in charge of border security. And I just say: You know, I'm going to conserve resources, and I can do that better by protecting only 49 of the 50 states, and so I'm not going to protect the border in Texas. And I say: Anybody that wants to come in, come on in.

Texas has no standing to do anything about that? They can't stop it, because the Supreme Court has already told them they can't stop it.

MS. HARTNETT: Well, I just -- to be clear about it, I'm just kind of -- you know, as a general matter, the policy at issue here is not a complete abdication. We're deporting 400,000 people a year, and we're otherwise using all the funds available. So that just is a place of holder.

But to your hypothetical, I think that would implicate different issues in the sense of the sovereignty and the territorial integrity of the state. This is not -- this is not a policy that's about encouraging or incentivizing flow -- massive flows and abdication at the border. I mean, there's a question of Article III standing there. And you're correct, it's some of the principles that I'm setting forth here which say that would be a very hard case for the state to make.

But there's also the *Heckler v Chaney* doctrine that would say if there was a complete abdication here or if there is a dereliction of direct Congressional command, that the state

would be able to get past *Heckler v Chaney* and make an APA claim.

So I'm saying in the very different hypothetical of that case where you're essentially positing the federal government having no presence at the border, not allowing -- letting people flow freely in, and --

THE COURT: They can have a presence there. They can just say: We're using our discretion. We've just decided not to prosecute anybody that comes into Texas.

MS. HARTNETT: Your Honor, that would be a wildly different case than what we face today and I think would present a much harder argument for the government with respect to standing. And that's -- the reason why we're making both a standing argument and a merits argument here is, of course, not because we don't fully support the merits of the policy, but here this is a policy that really is not having a direct impact on the state itself as a state. And that's one of the few cases where states are able to bring the unique case, the *Massachusetts v EPA* or the set of cases where the states are being directly regulated by the federal government. That's when a state has a right to come into court and complain.

But that's not what we have here today. And I think it's really important that the state -- that the Court, as the Court has recognized, you know, apply the Article III principles' guide for caution in allowing a state to come in before there is

that situation of true egregious abandon -- failure to execute the law. And I think that's where the *Texas versus United States* case from the Fifth Circuit is quite instructive, because there the states made I guess what you could -- made a, you know, credible or at least they made an arguable claim that they were feeling a -- the burden of a enforcement of the law in a way that they would not prefer; but nonetheless, the Court held that would not be -- that's not a basis for standing and not a basis to be able to challenge the policy.

THE COURT: All right. Mr. Oldham, you want to reply to any of that? And specifically let's look at how is the state -- touch -- walk me through, connect the dots for me. How is the state directly damaged?

MR. OLDHAM: Yes, Your Honor.

THE COURT: And you understand that Ms. Hartnett's argument about, well, we have to pay medical care and we have to pay educational expenses and stuff. Well, these -- you know, she's right for the most part. These aliens are already here. We're already paying that, so the new policy doesn't make one bit of difference as to that. So what -- how is the state directly damaged?

MR. OLDHAM: Yes, Your Honor. So let's start with exactly that population of people that you just asked about, so for folks who are already here without documents who will benefit from this policy. Once they get that employment

authorization card that we looked at on the screen earlier and only because they have that employment authorization card that we saw on the screen earlier, they can go to a driver's license office, for example, and they can get a driver's license that will cost the state money. Now, that is a direct economic harm on the state, not just Texas, but all the states that we've explained in the PI brief.

THE COURT: All right. And her argument is you don't have to give them a driver's license.

MR. OLDHAM: And that is -- it's remarkable, because the way I understood Ms. Hartnett earlier this morning, her response to you about whether and to what extent the state can change its policies is the exact opposite of what both the United States said in the brief that we looked at, but also what the Ninth Circuit held as applied to Arizona, Montana and Indiana -- I'm sorry, and Idaho.

So as to those three states, what the Ninth Circuit said is that when the United States -- when the Department of Homeland Security issues these employment authorization cards and when they grant deferred action to folks who are in the United States, the purpose of that is they want to let them work. They want to allow them, empower them to work in the United States. And you frustrate the purpose of that by denying them a driver's license.

And the United States said in that brief that we just looked

at that's in the appendix to the reply brief: That's right. You can't deny them a driver's license because it's going to frustrate the purpose, and it's going to create an obstacle to the purpose and frustrate the purpose of the federal policy.

So it's, quite frankly, troubling, that that -- that is exactly the opposite of what they said to the Ninth Circuit. And regardless again of what the State of Texas can do, it should be undisputed that Arizona can't do that. I mean, Arizona is under an injunction from the Ninth Circuit ordering them to issue these driver's licenses as a cost to the state, as is Idaho, as is Montana. And again, even if it were true that we could avoid it, we would still have to do the avoiding, and that itself is an injury. So I think those are --

THE COURT: Could Arizona have said: Look, we're not going to make a distinction between DACA and DAPA folks that are applying for a driver's license. We're just going to say: All right. From now on, no alien that's in the country illegally gets a driver's license regardless.

Can they do that?

MR. OLDHAM: Well, to be fair, I mean, I think that's what Governor Brewer had tried to do in Arizona. In her view -- I mean, I think this is the rub with the United States. I mean, in her view, she said: I don't recognize the legality of these deferred action programs. So in my view, these people are here unlawfully.

And the United States told her: No. In our view, the United States' view -- and as Your Honor pointed out, you know, preempting basically the Arizona's ability to talk about immigration status. They said, you know, in the federal government's view, they are here legally; and, therefore, you can't deny them a driver's license. So the short answer to your question is no.

THE COURT: Wasn't it partly because, though, they were just basically in the view of the Ninth Circuit at least, they were discriminating against two classes of aliens?

MR. OLDHAM: Well, my understanding -- so the short answer again I think is no in the sense that -- in the following sense. What Governor Brewer did initially is -- in the State of Arizona is she said: First I'm going to deny driver's licenses to people who have deferred action under this new DACA program. And then she amended that and said: No, I'm just going to deny it for all deferred action.

And the United States said: Well, that's preemptive. And why? Well, it's because when we give deferred action to folks and we give them employment authorization documents, they should be able to work; and they have to drive to work, and, therefore, you can't deny them a driver's license.

So that's -- that's the analysis in the Ninth Circuit. And it's the analysis that the United States in that brief told the -- the full en banc Ninth Circuit to accept, and they did.

And so -- and the Supreme Court has now denied cert on that cert, denied a stay of that six to three. And so that is the rule as we sit here today at least in those three plaintiff states.

So it's -- I just don't understand how those three states could possibly avoid what the Ninth Circuit has told them to do at the United States' behest.

And as to the rest of us, again, simply having to choose are we going to create a driver's license program that denies driver's licenses to everyone in the state? Are we going to choose a driver's license program and just hope that it's not preempted to deny driver's licenses to people who are here on -- you know, they had deferred action under Katrina or had a visa program under the U or T program. Are we going to create a driver's license program that somehow discriminates in classes of people based on their presence in the United States and just hope that the United States won't come in and say that it's preempted? That itself, putting the state to that choice, is an infringement on the state's sovereignty, and it's more than sufficient, I think, to trigger an Article III injury. So I think that all of the self-inflicted wound, to borrow the United States --

THE COURT: Well, get me to the cost of it. Let's say, okay, you have to give driver's licenses to deferred action people, including the DAPA and DACA people. So what? You're

already doing driver's license to everybody else.

MR. OLDHAM: So the Joe Peters' declaration, which is included in the exhibit, points out that the costs associated with doing -- with producing driver's licenses is not covered by the usage fee. So as the Court would be aware, the usage fee for driver's licenses is $24 in the State of Texas, and the costs are somewhere between 155 to $199, depending on volume. And that goes to, you know, hiring new people to process the applications, building new facilities, getting new computer terminals, getting new cards, getting new database searches which, incidentally, the United States charges the State of Texas every single time we have to authenticate a deferred action document through the SAVE system which is administered by DHS. So every single time someone walks in with a deferred action document, the State of Texas has to verify the validity of the document with the United States, and they charge us 100 percent of the cost.

THE COURT: Why do you have to do that?

MR. OLDHAM: Federal law requires it.

THE COURT: That you verify?

MR. OLDHAM: Yes, Your Honor, through the SAVE system. I think it's called the Systematic Alien Verification for Entitlements provision. And it's in -- it's in -- it's part of the modern statutory post 9/11 amendments to Title 8. So every single time someone presents themselves to a DPS office in the

state, they have to verify those documents.

And the thing I think is really important, to go back to the very beginning of your question, is that if someone walks in today right before this program has gone into effect and they do not have that little EAC card, they don't get a driver's license. They don't cost the state $155 per driver's license, much less $199. They're not eligible.

But if the states don't get an injunction and if they get these cards that the United States wants to give them, then they can show up and they will get them. So it is the tightest conceivable nexus between the thing we say is unlawful and the injuries that it will impose upon the plaintiff states.

And it's a direct concrete economic harm on the states that cannot be avoided for at least three of us, and can only be avoided for the rest of us even only hypothetically. Because given the shifting positions from the United States, we could only guess what the rule is going to be the next time we try to avoid this allegedly self-inflicted injury.

But even that we would have to exercise all of the machinery and levers of sovereign lawmaking to do. And that itself, forcing us to do that as opposed -- you know, to avoid that cost is itself an injury. So I think -- I think the driver's license point is open and shut; that is, it is -- it is directly traceable to this policy, it is directly economic, and it is only because the United States will give out these cards that we

have to do it.

If I might very quickly touch on three other points that Ms. Hartnett mentioned earlier. As we mentioned in the opening, the United States is continuing to conflate this concept of inaction and action and predicably invoked the *Heckler* case and wants to talk about enforcement priorities and focusing, you know, budget priorities, et cetera, on things the Department of Homeland Security thinks are important. And --

THE COURT: I guess maybe I'm missing -- and I've realized you had a slide or two in your PowerPoint about action versus inaction, but why does it matter? If it's an exercise of discretion whether to act or to inact, why does it matter?

MR. OLDHAM: Well, it matters in the following sense. It matters in a couple senses. One, Ms. Hartnett is correct that if the State of Texas was coming in and saying to this Court: Your Honor, we would like the United States to bring an enforcement action against a particular individual. Or if we were coming to this Court and we were saying: Your Honor, we would like an injunction that would require to use -- the absurd hypothetical from the opposition to the PI motion: We would like the United States to deport every person who lives in the United States without documents immediately. That would be a very different case because it would implicate notions of prosecutorial discretion, it would suggest that the states were trying to interfere with budget priorities, and it would raise a

lot of these justiciability concerns that the Supreme Court has talked about in cases like *Heckler versus Chaney*.

And so what I wanted to do at the very beginning, and I don't think we can talk about this enough today, because it is a reoccurring theme from them to try to conflate these two concepts because they know that when they're doing action, they have to have a legal basis for it. They have to be able to point to this Court and say: We have authorization to give out 4 million employment authorization cards. We have a statutory or a constitutional basis to do it, and here it is.

And the reason that -- I think it goes really to the heart of the merits of the case, but it also, I think, goes to the justiciability of the question presented. And so I think that's why -- why we want to point it out.

And so they have said, well, look at Section 1255(a), and it's a mandatory "shall" language. And you're absolutely correct. It says, "You shall -- the aliens shall be removed," and they're doing the exact opposite of that.

Now, why is that relevant? Is it relevant because we're demanding that all 11 million who are in the United States be removed today? No. The reason that it's relevant is because for -- really for two reasons. One, the Supreme Court in the *Heckler* case itself said that when the statutory commands are phrased in "shall" language as 1255(a) is, the *Heckler* concerns don't apply. In fact, they distinguish the *Dunlop* case in

Heckler itself because the statutory commands in *Dunlop* were "shall" as opposed to "may" or "the secretary is authorized" to do this, that or the other.

So just the text of 1255, as Your Honor quoted it earlier, distinguishes this case from *Heckler* and makes all of their reliance on prosecutorial discretion and setting priorities and inaction inapposite.

But it's also relevant in the following sense, and that is, Congress has specifically said in 1255 and 26, at least 26 by our current research count, at least 26 other specific statutory provisions like the one that Your Honor mentioned, here are the ways you have to do this. These are the ways you have to do it. If you want to authorize the presence of the parent of a U.S. citizen, this is how. These are what the rules are going to be. It's going to involve this particular visa application, this amount of waiting, this particular place at a consular office where you have to apply, this many -- this particular unlawful presence bar. This is how old the child who petitions on your behalf is going to have to be.

If you want to authorize the presence of the parent of a LPR or a legal permanent resident, these are the provisions you're going to have to follow. And if you want to authorize work for someone who is in the United States without documents, these are the provisions you're going to have to apply. And there's like ten or 12 or more of them, and they're all in that slot. And we

have copies for the Court's convenience. All of them say these are the ways you do it.

And the Department of Justice, the Department of Homeland Security, and the defendants in this case have said it does not matter what is in those 27 provisions. We're going to do it our way. And we're going to have a six-page memorandum that creates our own eligibility criteria that have no basis in the statute, and we're going to follow that process instead. And we're going to do it under the auspices of priority setting. That's one of the buzz words that Your Honor will hear. It runs throughout the papers.

And the two really important points that we want the Court to be aware of and to emphasize today is that, one, Congress is the person -- is the entity that sets the priorities. And two -- and they have in those 27 provisions.

And the second point is that it is an awfully and odd priority setting to say: Well, these are low priority cases, so we're not going to bring an enforcement action. That's one set of -- you know, one way you could handle it, and we're not challenging that.

What we're challenging instead is here's a set of low priority cases, and we're going to spend resources. We're going to spend millions of dollars. We're going to create new buildings, hire new people, create new forms, process new applications, grant new authorizations, give new rubber stamped

approvals, give new identification cards. We're going to spend money on these allegedly low priority cases.

So we think that what the defendants are doing and have promised to do belies this entire suggestion that this is all based on enforcement discretion or focusing resources away from low priority cases. In fact, those low priority cases are getting the resources.

And we've actually pointed to emails in reply to the -- in support of the preliminary injunction motion where members of the Department of -- I'm sorry, employees of the Department of Homeland Security have diverted resources away from other things to these allegedly low priority cases.

The third point, speculation. We heard a little bit from Ms. Hartnett this morning about how the states' injuries are allegedly speculative and that the independent actions of undocumented individuals should not figure in to the standing analysis.

So a couple points about this. One, we are not -- you know, we have an independent basis over and above what independent actions of independent undocumented aliens will do. And that is, as to the people who are not -- I'm sorry, who are here lawfully -- I'm sorry, unlawfully now. All right. So for the approximately four to five million people who will be benefited by this program who are in the United States and meet the eligibility criteria that were unilaterally created by the

defendants, we're not relying on the independent actions of third parties. They made those individuals categorically eligible for a new slew -- for a whole slew of new government benefits.

THE COURT: Such as?

MR. OLDHAM: Well, all of the ones that we talked about before. So that's Social Security numbers, Social Security benefits, Medicare, earned income tax credit.

THE COURT: But those are all federal benefits, aren't they? How is the state harmed by that?

MR. OLDHAM: So this is a slightly separate concept. One of them is how is the state injured by it? And the second is did the defendants take affirmative actions? So all of those things were affirmative actions, and they have concomitant costs upon the states. So some of those are things like licensing, but some of them also are things like healthcare, law enforcement and education. So if we talk about the later category for a second --

THE COURT: Ms. Hartnett's point is you're already having to provide that --

MR. OLDHAM: So --

THE COURT: -- before DACA was -- before November 20th or whatever the date was. On November 19th before this thing was issued, say that Texas was already obligated to do that. Supreme Court makes you do that.

MR. OLDHAM: That's right. And so -- that's absolutely correct, Your Honor, and it has been that way for years, even since the *Texas versus United States* case that Ms. Hartnett referenced earlier. But this is the bottom line point. If you compare on November 19th, 2014, before the DAPA announcement, every individual who is in the United States and undocumented and imposing the costs that we've talked about through healthcare, education, et cetera, on the State of Texas had some probability of leaving the United States. And Dr. Eschbach has pointed to statistics from the demography literature that it's -- you know, it's a quarter of the population at some -- different -- somewhere between 20 percent and a quarter of the population that could emigrate in any given year. And those people now have no reason to emigrate because they now have a piece of paper and an authorization card from the United States that lets them stay and to continue imposing those costs, right?

So whatever we would talk about the speculative -- they want to call it speculative. We would submit that it's no more speculative than greenhouse gas emissions. But whatever is going to happen with respect to the new people who will come, there should be no dispute as to the people who are here and who now are authorized to be here, who are now authorized by the federal government to continue imposing those costs on the states. And those costs are millions and millions and millions of dollars or billions of dollars, in fact, and are documented

in declarations attached in the PI papers.

So I think that the speculation argument, it falls apart in two different ways, right? This is one way, the way in the sense that there are people who are here and who now do not have to go and who can stay lawfully in the United States with their federal identification card who would continue imposing those costs.

And it also falls apart in the sense that whatever new inducements might come for new people to come based on the fact that, you know, in the last two years alone -- I mean, this is the second time they've done this, right? In 2012 they said, well, no one would have any oppor -- you know, reason to come in response to DACA because it only applies to people who have been here. But, of course, now two years later, they expand it and they say: Well, no, don't worry about that. Now there's no reason to come because of DAPA because it only applies to people who are here.

But as Dr. Eschbach has explained, every time the government does this, it does create an incentive because the people will think: Well, they've done it twice in two years. Maybe they'll do it again in 2016. And that chain of causation between the government policy, the incentives it creates and the costs it imposes upon the state is dramatically tighter than what happened in *Massachusetts versus EPA*.

And I recognize that the Justice Department lost in

Massachusetts versus EPA, and they argued forcefully that that is a speculative chain between regulating emissions from carbon -- from the tailpipes of cars, just new cars sold in the United States, all the way up to and through and including other emission controls, other countries in the way they might regulate greenhouse gases, all the way up to and including international treaty obligations, et cetera, all the way up to atmospheric mixing of the greenhouse gases, all the way to global warming and then raising the sea tide and then eroding centimeters from the Massachusetts' shoreline. That is a dramatically more tenuous connection of causation than what we're talking about undocumented in the Eschbach declaration. So I think the speculation concerns should be rejected on that basis.

And the last -- the last rebuttal point that I would like to offer is this zone of interests argument that Ms. Hartnett mentioned earlier. And I think this argument is problematic for a couple different reasons. One is that if you look at the APA, the APA does give us a right to procedural regularity from our federal government. It gives every affected individual a right of procedural regularity from the federal government. That's the entire point of that statute ever since it was codified in 1946.

The entire point is to ensure that when people are aggrieved by the way that the government is making legislative rules, that

we have an opportunity to have public comment and that they reach a reasoned, nonarbitrary and non-capricious decision that takes in -- that takes into account the views of affected people. So that's the APA.

But it's also true as to the INA. The *Perales* case, which is a Fifth Circuit decision from 1992 and is cited in both their papers and ours, says that one of the purposes, one of the key purposes of the INA is to protect workers. And it's not just the *Perales* case. *Alfred L. Snapp* says the same thing. That's also an INA case. And it's also, as an aside, a case where the Commonwealth of Puerto Rico was allowed to come into federal court to talk about that.

And so you can't -- they can't simply say, well, these are interests that, you know, the state was not designed to protect. And *Perales* says that it matters to workers. *Alfred L. Snapp* says states are allowed to vindicate their workers' rights through parens patriae actions.

And so both of those I think do away with the zone of interest inquiry, and that's even assuming -- that's even assuming that the zone of interests inquiry does any work for them after *Lexmark*. Because as the Court will recall, the Supreme Court of the United States in the *Lexmark* decision talked a lot about what the zone of interest inquiry does.

THE COURT: Texas hasn't made any argument or any of the other states that they're here representing the rights of their

workers, are they?

MR. OLDHAM: Oh, yes, Your Honor, we have. I think that's exactly what the Dr. Welch declaration is designed to do, which is to say that as -- because of the way that they have structured this program and because of the way that they've structured other federal programs, U.S. workers will be more expensive to hire compared to similarly situated non-U.S. citizens. And so -- and that is exactly the sort of discrim -- economic discrimination that gives -- that would -- that was at issue. I mean, *Perales* talks about it. But it's also exactly what was at issue in *Alfred L. Snapp*. And I think that's the basis for our third -- our third standing argument is the effects on the labor markets created by what the United States has done.

THE COURT: Okay. All right. I didn't understand that. Here's what I want to do. Let's take about a ten-minute break, stretch break, and let's come back and talk about the merits.

(Recess taken from 11:35 to 11:49.)

THE COURT: All right. Be seated.

Mr. Oldham, let's talk about merits.

MR. OLDHAM: Yes, Your Honor. The states have two claims in this case. The first is the Take Care Clause, and the second is really two separate claims under the APA. But we'll group them together under the Administration Procedure Act, and

we urge the Court to find that we're likely to succeed on both.

Let's start with the Take Care Clause. On the merits of this claim, it's the states' position that this case is materially identical to *Youngstown Pipe and Tube versus Sawyer*, which is the 1952 case in which President Truman attempted to seize the nation's steel mills. Both of these cases arose when the president went to Congress and asked for authority to do something of national importance. And in both cases Congress refused the president's request.

In *Youngstown*, as in this case, the president nonetheless acted unilaterally. In *Youngstown*, as in this case, the president invoked precedent from prior administrations. And in *Youngstown*, as in this case, the president demanded unfettered unilateral power to do what he pleased without the supervision or any authority to check in federal court.

Both cases, we would submit, should end in the same way, namely with the federal court enjoining the unlawful action. And as we go through these following slides and we talk about the *Youngstown* case and you see the eerie parallels between what happened in 1952 and what happened in 2014 and is happening today, it is remarkable that the position of the United States is that *Youngstown* is so irrelevant that it merits only a single sentence in a 349 note footnote on page 30 of its opposition.

So let's start with this case. As the Court will know, the president told the nation that he took an action to change the

federal immigration laws unilaterally because he was tired of waiting for Congress to reform the immigration system. And he said that if anyone in Congress disagreed with what he had done, they should, quote, pass a bill. This is what the president said.

"When members of Congress question my authority to make our immigration system work better, I have a simple answer: Pass a bill. And the day I sign that bill into law, the actions I take will no longer be necessary."

Now, President Truman did the exact same thing. In April of 1952, he sent two letters to Congress. They appear on these two pages of the Congressional Record.

And in the left-most pane, you can see that he wrote the following words. This is after he seized the steel mills. "The Congress can, if it wishes, reject the course of action I have followed in this matter. And if it does, the Congress should pass affirmative legislation to provide a constructive course of action looking toward a solution of this matter which will be in the public interest."

And in response to these two letters in 1952, no less than in response to the president's "pass a bill" order in 2014, Congress refused. And in both cases, *Youngstown*, like the one before you today, the president acted anyway.

Now, in order to act unilaterally after asking Congress for the authority and being told no, both the presidents had to

ignore an enormous amount of statutory law. We've touched upon this a little bit earlier, and now I'd like to go through it in a little greater detail.

As to parens --

THE COURT: Before I let you go further, I asked Ms. Hartnett this, but let me ask you this. Does it matter to either side, the argument of either side that we don't have an executive order here? In fact, as far as this Court knows, President Obama has not done anything. All we have is a memo from the Secretary of Homeland Security. Am I right? First of all, am I right, that's all we have?

MR. OLDHAM: Yes, Your Honor.

THE COURT: And does that matter to either side's argument?

MR. OLDHAM: In our -- in our view, it only makes this more lawless in the sense that all we have is a procedurally irregular -- that is just a memo fired off by the Secretary of DHS -- ordering officials at DHS to do things that we argue are contrary to the statutory provisions that we'll talk about in a second.

But legally as to sort of whether the claims are cognizable or who are the proper parties or any of those sorts of concerns, then no, it really doesn't because as the Court will know, there was an executive order in the steel seizure case, in the *Youngstown* case. And the suit was nonetheless styled steel

mills, that's *Youngstown Pipe and Tube versus Sawyer*, who is the Secretary of Commerce, not President Truman. And that's for a variety of federal courts reasons, many of which are -- which apply both under the Take Care Clause cause and also under the APA that the president himself is not a proper party to these disputes for reasons that go to Article II, but --

THE COURT: Okay. Go ahead.

MR. OLDHAM: So as to parents of U.S. citizens, myriad statutory provisions that talk about how Congress -- again, these are duly enacted statutes. These are the provisions that talk about how Congress wants to authorize the presence of parents of U.S. citizens, parents of legal permanent residents, and the circumstances under which Congress has given the Executive Branch the authority to grant work permits; 27 by our count. And these are all of the ways that Congress would like this matter to be handled.

And in order to do what the defendants have done and in order to do the things that we say are unlawful, the president and the Department of Homeland Security had to take all 27 of these, put them aside, and then write their own criteria, their own eligibility criteria for when parents of United States citizens can stay, for when parents of legal permanent residents can stay, and when work permits can issue.

Likewise in *Youngstown*, Congress imposed lots and lots of limits on the president's power to seize industrial property.

And I'm not going to go through it in great detail, but I do think it's highly interesting and relevant, directly relevant to these legal questions. That in appendix 1 of Justice Frankfurter's concurring opinion, he collected a ten-page table of all of the various statutory provisions, the statute, the duration, the scope of authority to conduct seizures, the limitations on its exercise, and he went through each one of them and said: This is what Congress has said. When we want the president to have the power to do what he did, these are the circumstances in which they can be done. And nowhere in that table did he find authority for the president to seize the nation's steel mills in the middle of the Korean War.

And here, as in *Youngstown*, the fact that Congress fought about all of these circumstances and put all of these limits and did not give the president the power he claimed, that itself is proof that Congress intended to prohibit what the president has done.

That is, the fact that Congress fought about the issue and imposed these restrictions means that the president cannot simply pretend that the restrictions don't exist, and much less can he find in the myriad restrictions, those 27 statutory provisions that we just showed you, can he pretend that hidden in those restrictions is an authorization to grant benefits to 4 million people.

As Justice Frankfurter concluded, it's one thing to draw an

intention of Congress from general language and to say that Congress would have explicitly written what is inferred, but Congress has not addressed itself to that topic. It is quite impossible, however, when Congress did specifically address itself to a problem as Congress did to that of seizure to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

Now, the defendants surely will protest here, as they did in the *Youngstown* case, that previous presidents have gotten away with what they want to do; and therefore, they should too. Two crucially important points on this topic.

First, the Supreme Court, again in the *Youngstown* case, said that such presidential pleas to precedent are irrelevant. This is from the majority opinion written by Justice Black where he said, "It is said that other presidents without congressional authority have taken possession of private business enterprises in order to settle their labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the constitution and the government of the United States."

And the second point, not only is it irrelevant, but the second point is it's also quite astounding to look at the extent to which the Justice Department in the *Youngstown* case, like the Justice Department in this case, is willing to stretch those analogies to historical precedent.

So this is another appendix to the Frankfurter opinion. Again, I won't go through it in great detail, but it is highly relevant to show that in the *Youngstown* case, when President Truman and the Department of Justice went to the Supreme Court to justify seizing this nation's steel mills, they pointed to these examples of previous precedents. In World War II President Roosevelt, but also prior to President Roosevelt, President Wilson had invoked previous plants and facilities that they had seized and then gave all of these examples about how this was -- these -- the properties had been seized and whether it was lawful.

And in *Youngstown*, Justice Frankfurter goes through all of those and points out: You know what? Not only are these irrelevant, but they're also distinguishable because not one of them involved a president who said that he could seize all of the steel mills unilaterally.

The same stretching of analogies is true here. So take, for example, one of the Justice Department's favorite examples that it has trotted out both in the OLC memo that they used to justify the legality of this program, and also again in their

briefing before this court. And that is a previous presidential administration granted deferred action to students affected by Hurricane Katrina.

Now, the students affected by Hurricane Katrina, a few thousand, were already in the United States lawfully. They had visas. This is from the Department of Homeland Security's own documents, all right? The people affected, the Katrina impacted foreign academic students were already visa holders. But an act of God, that is a massive natural disaster in the form of Hurricane Katrina, forced them into noncompliance with the conditions of these F-1 visas, because the universities in Louisiana and surrounding environs closed after Hurricane Katrina, and the students, therefore, were no longer enrolled full time in college.

So because they were already here lawfully, the Department of Homeland Security gave them two months. The date of the memo, the 25th of 2000 -- November 25th, 2005, to February 1st of 2006, to transition from a lawful F-1 visa status to another lawful visa status.

Now, it should go without saying that nothing in a precedent involving a few thousand students who are already here lawfully in the United States pursuant to a Congressional program statutorily authorized granting them a few months to move from that to another lawful status because an act of God had pushed them out bears no resemblance at all to, as the defendants

themselves have described this program, millions of people, extendible periods of deferred action for people who are not here lawfully today and won't be here lawfully at the end of the program.

Finally, the defendants in *Youngstown*, like the ones before you today, insisted that none of these legal niceties really matter. What they said is that they cannot be forced to answer to any plaintiff, whether it's a state or otherwise, in any courtroom ever. This is how the DOJ lawyer explained it in *Youngstown*. He told the federal district court in the District of Columbia that as far as the Courts go, the president's power is, quote-unquote, unlimited. And it's also, quote-unquote, conclusive.

Truman argued that the only powers on his limit -- on his executive authority to seize the nation's steel mills were the ballot box and impeachment.

Now, in this case what the defendants argue is that their powers are also unlimited and that this Court can do nothing to stop them. And they base that assertion on this canard which you've already heard today of executive discretion or enforcement setting. And they say that deferred action is like a decision not to prosecute somebody. And because a decision not to prosecute somebody is generally immune from judicial review, well, then, so too should the creation of a new federal program to give out 4 million authorization documents to people

should also be immune from judicial review.

Now, as we've already explained, this directive in its scope, its scale and its substance bears no resemblance to a decision not to prosecute an individual person because the defendants are doling out benefits under state and federal law that they do not have the legal authority to do.

But it also bears no resemblance to discretion. So this is the template that the USCIS has used for denying deferred action to DACA beneficiaries. And I apologize for the quality of the reproduction. It's been scanned multiple times. But if you can look closely, you can see on the left-hand side of the printout a series of little check boxes where if you want to deny deferred action to somebody, you can check a little box.

So what are the reasons? They're all eligibility criteria. These are not from statute. These are not from the 27 provisions that Congress gave. They're not from the regulations that have been -- that people have opportunities to challenge through notice and comment. These are things that they unilaterally created on their own in a six-page memorandum. It's things like you have failed to establish that you came to the United States under the age of 16. Or you have failed to pay the fee for your application. So these are their criteria.

And this form does not contain a box that says: Well, using our discretion, even though you meet our eligibility criteria, we're nonetheless going to deny you deferred action. And, of

course, even if -- even if they were to add a box that said: Oh, well, we could also deny it for any reason or no reason at all, they have pointed to not one piece of evidence, not one case, not one planned case where they ever have or plan to deny a single person for purely discretionary reasons; that is, for reasons that have nothing to do with the eligibility criteria that they unilaterally created, and that is by design.

The -- as the USCIS union president himself has explained, these deferred action programs were not created to use case-by-case or discretionary decisions the way a prosecutor would decide not to prosecute someone. Rather, these are government entitlement programs. And the vast majority of applications, far in excess of 90 percent, are simply rubber stamped. And the others are denied for failure to meet the defendant's eligibility criteria.

So to just give an illustration. If Bill Gates applies for a means tested entitlement program like Medicaid, his application will obviously be denied, but it would be denied because he fails to meet the means tested eligibility criteria. It's not going to be denied for discretionary reasons.

And the exact same thing is true in this case. The only difference is that the eligibility criteria for Medicaid come from Congress. They come from statutes that were enacted the way Article I and Article II and Article III contemplated. And the eligibility criteria for this program come from the will of

the Executive Branch alone. They've usurped the power of Congress. They have acted outside of the bounds of Article II. And therefore, we submit that the plaintiff states are likely to succeed on the merits of their Take Care Clause claim.

Turning to the APA. We have two basic reasons that we'll succeed on the APA claim we would submit to the Court. The first is that the DHS directive or the DAPA memorandum from 2014 is what is called a substantive rule. And the second is that substantive rule is unlawful both procedurally and substantively.

Now, what is a substantive rule? As the Court will recall, the APA gives us the right of judicial review when an agency promulgates what's called a substantive rule. And a substantive rule, as the D.C. Circuit has said in the *Appalachian Power* case, which is one of the leading authorities on the question, is one that orders, commands and dictates; that is, speaks in authoritative terms, not tentative ones. And this directive has commands, orders, and dictates from the very beginning to the very end.

So here's a sampling of them. The Secretary of the Department of Homeland Security directs these provisions will apply. These other provisions will no longer apply. Certain time periods will be extended. This program shall do this. Applicants will pay that. There will be no fee waivers for the other thing. On and on and on from the first page to the last

page.

And there can be no doubt and the defendants have pointed to no case that suggests anything that looks like this can possibly be something -- I'm sorry, anything other than a substantive rule.

So to just take an example from the *Appalachian Power* case which we just talked about. In that case EPA was issuing guidance documents. They were just letters that said: Here are the criteria that we intend will apply. And they went into the federal court and they said: Well, we should be able to do this without having to comply with the APA because this is just a statement to the public. We're just advising folks about how we intend to handle these applications.

And the D.C. Circuit resoundingly rejected that argument. It doesn't matter what they want to call it. It doesn't matter if they want to come to this court and say they're just -- this is a statement of intention. This is merely us telling you what we plan to do in the future.

Because these provisions here speak in unqualified shalls, musts, wills and will nots, it is a legislative rule or a substantive rule, and it therefore must comply with the APA.

Now, once it's a substantive rule, then it triggers a whole host of remedies for the plaintiffs under the Administrative Procedure Act. First, the notice and comment requirements are quite easy and straightforward for the Court in the sense that

the United States has conceded that they did not issue this directive through notice and comment. The State of Texas, none of the plaintiff states, none of the members of the public has ever had a chance to offer public input into what the defendants have done, much less have they responded in a notice and comment on rule making to the public input that the states would have offered if we had been given the opportunity.

And as a consequence -- for that reason alone, for that reason alone it's procedurally invalid under Section 553 of the Administrative Procedure Act.

And it's also substantively unlawful, that is under Section 706 of the APA, because it's arbitrary, capricious and contrary to all 27 of the provisions that we gave before. So we've pointed out in the brief there's long lines of precedent from the D.C. Circuit, the Fifth Circuit and the Supreme Court that say when Congress specifically speaks to a topic, as they obviously have here for both people who -- for authorizing the presence of parents for U.S. citizens and LPRs, and also for work permits, then the Executive Branch cannot take agency action that's contrary to those provisions. And since Congress specifically legislated to the topic, there is no gap for the agency to fill.

So what's left after the merits of the APA claim? Well, there are -- as the Court knows, there are three remaining preliminary injunction factors. So I would submit that it's

difficult to contest that the plaintiffs' injuries are irreparable in the sense that we will have to make investments that we cannot recover through healthcare, education, law enforcement, et cetera. And once the defendants start issuing these employment authorization cards, once those driver's license-like documents start issuing and circulating, it will be almost impossible to recover them and unring that bell.

And both because those EACs will be in circulation and also because once individuals have those EACs, they'll be able to qualify for all manner of things like marriage licenses, driver's licenses, professional licenses, like to be a member of the bar, and all of those things would have to be revoked.

So the defendants cannot explain or have not explained how those things could be undone, and they definitely have not explained how the Court could undo all of those things, both with respect to the cards, but also the benefits that people get with those cards, including things like marriage licenses, driver's licenses, professional licenses without imposing serious harm on the people who are holding them.

So I think that the irreparable injury prong is satisfied for that reason.

On the balance of the equities --

THE COURT: Let me go over something real quickly here.

MR. OLDHAM: Sure.

THE COURT: You said irreparable harm on the people who

are holding the cards. But don't I have to have irreparable harm to the state if you're the one suing?

MR. OLDHAM: Oh, yes, Your Honor. But these are -- I mean, these are things that the state is providing to people. These are programs that the state administers, right? So if the state has people, for example -- you know, if the Bar of Texas has people that are on its rolls with employment authorization cards, I mean, those are injuries to the state. They're injuries both to the state, but also to the person who holds the card.

So I don't think that there's a way to extricate the injury to the person who holds it, which is obviously significant, from the injury of the state, which is the one that gave it. So I think on both sides of that inquiry the injuries are irreparable in the sense that they cannot be easily undone. The cards cannot be clawed back, at least not easily. And the United States certainly hasn't explained how it could be to the contrary.

The balance of the equities. The United States has not explained also what exactly is the emergency that requires changing the status quo. So as Ms. Hartnett explained earlier, the status quo has existed for a long time. And even if everyone could agree that it was broken and that there was a problem with it, the status quo -- since the status quo is as it is today, the United States is the one that wants to change it,

and they can't point to an exigency that would require changing it before the conclusion of judicial proceedings and the opportunity for the plaintiff states to have their day in court.

And, of course, even if they could point to an emergency that would require issuing these documents right now, as they have promised to do within a month or so, the United States Supreme Court has also said that even the exigencies of the Korean War -- I mean, President Truman seized steel mills in 1952 while U.S. service members were fighting abroad. And even those exigencies, even the need for steel for airplanes and boats could not justify a transgression of the Take Care Clause.

And so I'm not -- I think the balance of the equities clearly tips in favor of preserving the status quo, just as long as the plaintiffs and this Court need to resolve the merits of the claims that are presented.

Finally on the public interest prong, we think it's been satisfied for several reasons. The one that I would highlight again are -- is the tax example. As you've seen from the way President Truman justified seizing the steel mills and the way the current president has justified his unilateral action in this case, the practice of the Executive Branch over the course of decades is to use previous precedents to justify future incursions of executive power.

And the next president will be able to look at this program and say: I've been working with Congress to amend the tax code.

I think taxes are too high, and I would like to reduce them, but Congress refuses a comprehensive overhaul of the tax code. And therefore, because my Secretary of the Internal Revenue Service -- I mean, I'm sorry, the Commissioner of the Internal Revenue Service has discretion in how to enforce it and because, quite frankly, we're resource strapped and we can only audit one percent of tax returns that are filed every year, I'm going to direct my secretary -- I'm sorry, my commissioner of the Internal Revenue Service to create a program to hand out to 40 percent of American taxpayers little cards. And they can use those cards to pay lower taxes, to pay no taxes, to forgive back taxes, or to forgive taxes in the future.

And that program, which would -- the next president can apply to taxes could also apply to the environmental laws, could also apply to the workplace protection laws. There really is no limit. And the only way to stop it is to do what District Judge David Pine did in 1952, and that is to issue an injunction, allow the federal courts to look at the legality of what has happened here, ensure that it comports with Article II of the Constitution, ensure that it is procedurally and substantively regular under the Administrative Procedure Act, and to give the plaintiffs a day in court.

So after the preliminary injunction factors, all that's really left is the injunction itself. And I want to talk a little bit about what the injunction would look like, what the

plaintiffs propose the injunction should look like, and I want to return to what I think is going to be a theme for today. It already has been from Ms. Hartnett this morning. And that is what exactly the plaintiffs want and what we won't want, or what is it we're not asking for really.

So let's talk again about the *Youngstown* case. So in the *Youngstown* case, the president obviously took an action, right, just like we were saying the president has taken action here. And the action he took there was to seize the steel mills. And as I mentioned, Judge Pine issued an injunction, and this is what it looked like.

It said, "Adjudged and ordered that pending this final hearing and determination of this cause, the defendants," et cetera, et cetera, et cetera, "are hereby enjoined and restrained from continuing seizure, possession of the plants," blah, blah, blah, "and from acting under the purported authority of Executive Order No. 10340."

So similarly here, we request an injunction that would say what the defendants have done and promise to do under the authority of two memoranda that are substantively and procedurally unlawful should be enjoined.

And so this -- the text of this proposal comes straight out of what the district court did in the steel seizure case, and it is exactly what would redress the injuries that the plaintiffs have proffered in their pleadings here. And you will see in

this injunction, we are asking that the defendants do not solicit, accept, approve applications for or otherwise grant deferred action and employment authorizations. That is that they're not -- they're restrained from doing something, not that they actually go out and do anything.

Thank you, Your Honor.

THE COURT: Let me ask one question. And really I'm asking this to both you and Ms. Hartnett. This Court has been working under the assumption that DACA, D-A-C-A, is not in front of it. Am I -- am I correct in that?

MR. OLDHAM: Yes, Your Honor. We have not.

THE COURT: Ms. Hartnett, you agree with that?

MS. HARTNETT: It's not part of our claim.

THE COURT: All right. I just wanted to make sure. I -- that's the assumption I was working under.

MR. OLDHAM: And, Your Honor, if I might just explain. The reason that we talk a lot about DACA is because the -- it's really two reasons. One, we know how DACA operates, at least in broad brush strokes, because it's been implemented for two years. So we actually have documents, we have evidence about what the defendants have done under DACA.

And the second is that on pages 12 and 40 of the opposition to the PI -- the opposition to the PI motion that the defendants filed, on pages 12 and 40 of their brief, they have promised us that DAPA will operate exactly the same way that DACA did. So

we think -- you know, we can both -- we can talk about them together only so that the Court understands what the relevant facts are and the relevant legal principles are, even though as the Court has acknowledged -- has pointed out and we agree, we are not challenging the DACA program.

THE COURT: All right.

MR. OLDHAM: Thank you, Your Honor.

THE COURT: Ms. Hartnett?

MS. HARTNETT: Thank you, Your Honor.

And just to be clear on that last point, the memoranda that -- the memorandum, there's one directive that the plaintiffs are challenging in the complaint, and that both is directed toward the DAPA program, but also is a expansion or revision of the DACA program. So to the extent that there's a revision or expansion of the group that would be eligible to apply for that, we do understand the plaintiffs to be challenging that.

THE COURT: The increase in years?

MR. OLDHAM: Your Honor --

MS. HARTNETT: They ask to have you direct and enjoin, and that directive would allow the revisions to the DACA program that we described in our brief.

MR. OLDHAM: Yes, Your Honor. I'm sorry. When I said that the DACA program, I was referring to 2012 DACA action. We are challenging the series of executive actions that were taken

on November 20th, 2014.

THE COURT: Okay.

MS. HARTNETT: And just to that point, Your Honor, I would just add I didn't want to unduly object to the presentation today, the PowerPoint, but it does contain a -- not only additional argument, but the injunction that's proposed there is different from the one they propose in their papers. And to that -- the comment that was just made that there are several executive actions being allegedly challenged, there was one directive that was the subject of the complaint, and that's what we've been briefing this case around, which is the one about deferred action.

THE COURT: And I'm going to give you a chance to file a reply anyway, so that's -- I'm saving my housekeeping matters for the end, but I know you have a motion on that.

MS. HARTNETT: Yeah. We just wanted to be able to make sure we were clearly responding to that. Although I would note that much of the same logic and argument that the counsel for state has been putting forth here today would not -- would appear to apply to any exercise of discretion by the Department of Homeland Security, including the routine use of deferred action in individual cases not even part of any larger effort.

I would like to turn to *Heckler versus Chaney* again just because that does frame our merits argument, but I first would like to start with the *Youngstown* points that the counsel for

the state was making because at some level, they're really just quite flawed.

This case is not materially identical to *Youngstown* in any respect. And I would say the first and foremost was in *Youngstown*, the president was -- it was a presidential executive order. That's a distinction. We've talked about whether how much of a difference it makes. But more importantly, the president conceded there was not statutory authority for his action in that case.

In this case, the Department of Homeland Security is invoking and the Secretary of the Department of Homeland Security is invoking his authority under the INA. And I know that counsel for the state had the -- on the slide several different provisions of the INA that they were focused on, that they claim preclude the authority being issued here or being exercised here. But they ignored some of the critical provisions that are key to our understanding of what the secretary's powers are. And that includes 8 U.S.C. 1103(a) which gives the secretary a broad power to take actions necessary as he deems necessary to execute that law.

And then 6 U.S.C. 2205, which these are cited in our brief, directs the secretary to establish national immigration enforcement policies and priorities.

In addition to those -- and there's -- we can cite other parts of the INA that support our general principle that what

the government is doing here is consistent with what Congress intended, which was to direct our enforcement authorities where they are needed most.

But there's also the Supreme Court precedent which acts -- which was conspicuously absent from the slide show, including the Arizona case and the *Triple ADC* case. Again, they weren't about the specific type of program, but they did endorse the general notion that the executive has discretion in the removal of aliens.

And I would take -- the state also kind of suggested that somehow we were hiding the ball in *Youngstown* in our presentation. We weren't. They cited a couple of times in their opening brief and made their reply brief about it. The reason why we didn't dwell on it is because this is not really a case in which we're defending the president's actions or the actions of the Executive Branch under the Take Care Clause. Because as I noted, this is a case where statutory authority provides the framework for understanding the powers of the Secretary of Homeland Security.

The state also made some comments about the president's remarks about wanting to get legislative change and alleging that when he didn't get that, he just did the same thing administratively. That is simply wrong.

THE COURT: Well, isn't that -- he said that, didn't he?

MS. HARTNETT: Well, I think it's --

THE COURT: I mean --

MS. HARTNETT: No.

THE COURT: I mean, the President of the United States has said that publicly.

MS. HARTNETT: I think it's important to focus on what was being said, though. What the president was pushing for was comprehensive immigration reform that would include a path to citizenship for certain groups of people that are illegally present.

Deferred action, he did not try to effectuate that through executive action.

THE COURT: No, but he said if you don't do it, I'm going to do it, and now he's done it.

MS. HARTNETT: I think the "it" matters there, Your Honor. And the "it" here is doing what he can do within the bounds of the authority that he has, and meaning he obviously announced the executive actions. The Department of Homeland Security is responsible for this -- this statute and for this program. And my point is simply that what they've done is -- and they sought counsel from their -- the office of legal counsel. And what they've done is, within the bounds of their legal authority, sought to address a problem that's a serious national issue.

And Your Honor has -- you know, we've spoken about this. The border security crisis is a real one, and the sheer number

of illegally present people with not enough resources to remove them all is a real one. That's why there's been a press for some change, legislative change. Legislative change did not occur. The fact that the president or the administration or the Secretary of Homeland Security most specifically used the available authorities to try to address the problem consistent with the advice of their counsel, I think that should be something that is not -- is not a point of criticism, but actually a point of trying to effectively address the problem with every tool that's available. And that's why it really is just different from *Youngstown*. We go to a case where the president conceded that there was no statutory authority for the action. And that was not a case in which the plaintiff --

THE COURT: What statutory authority does the Secretary of Homeland Security have for allowing 4 million plus aliens to stay in the country for three years?

MS. HARTNETT: I mean, it's the main powers I would suggest -- I mean, it's --

THE COURT: Are the ones -- I mean are the ones you've already told me.

MS. HARTNETT: Correct, and -- I mean as -- as interpreted by -- I mean, those -- those statutes existed at the time that -- and removal, as the Supreme Court said in -- you know, in the *Triple ADC* case, the way that the Supreme Court described the use of deferred Court action there, if I might, is

that it was a regular practice. That was as -- as of 1996. They described a regular practice which would become to be known as deferred action. They noted in -- the Supreme Court noted that the executive has the discretion to abandon the endeavor, removal, at every stage of the case.

And then in the Arizona case, which was less specifically about deferred -- it wasn't about deferred action per se, but there it talked about broad discretion. It talked about whether it makes sense to pursue removal at all. My point just being that the *Youngstown* -- I appreciate that -- obviously --

THE COURT: No, I understand your point.

MS. HARTNETT: Right, that all these executive actions are informed by all the provisions of the constitution.

THE COURT: Mr. Oldham is arguing the case that's most favorable to him, and you're arguing the case most favorable to you. That's to be expected.

MS. HARTNETT: That's true.

But I think another important point of that case, there was actually a seized steel mill which provided a party that had obviously a standing to be in the case as well. But I think that, you know, in short, the statutory authorities where we look to, and that's why we believe the actions here are lawful.

I also would just point to the other -- the other sources of statutory authority -- Your Honor has already referenced them -- for the employment authorization documents. That is not a

legislative dictate of the memoranda from November what the -- the employment authorization document is authorized by a statute, 8 U.S.C. 1324. And there's a longstanding regulation that implements that statute, allows the secretary -- I also would note that that -- that provision of the INA which allows the secretary to grant work authorization to certain aliens who are -- who are here unlawfully but otherwise -- but have been -- but are in a deferred action category, that was not on there. Their side is one of the work authorization provisions. But it's an important one because in 19 -- in 1986 when Congress passed IRCA, they were legislating against the background of a -- at that time a DOJ regulation that allowed for deferred action recipients to get work authorization. So the memorandum from November did not create work authorization. Independent statutory authority provides for that.

I did address *Heckler versus Chaney*. I did address *Heckler versus Chaney* in the -- in my first presentation, so I won't dwell on that here, but I do think it's an important framing of the merits. Because even if you get to the point of finding Article III and prudential standing, the next question would be whether this is the appropriate type of action to be reviewable under the APA.

I would just point out that some of the discussion of inaction versus action is really not -- I don't think that's the touchstone for any of the inquiries along the way. But in

Heckler versus Chaney, the question is really one -- is it an enforcement policy? Is it a policy about the agency's exercise of discretion? And I think this fits comfortably within *Chaney*. And as we've discussed, there is no Congressional mandate not to do deferred action. To the contrary, there's been Congressional acceptance of the practice and including --

THE COURT: There's no Congressional authorization anywhere of deferred action, is there?

MS. HARTNETT: There's Congressional authorization to the department to take broad actions as they deem -- as he deems --

THE COURT: No. But, I mean, there's no -- there's no act that's called the Deferred Action Act that says the Secretary of Homeland Security or the Attorney General is hereby authorized to give deferred action to anybody you want to.

MS. HARTNETT: Nothing that broad, Your Honor. There have been a few times where the Executive Branch has undertaken to give deferred action to a certain group, and Congress has later memorialized that. There have been a couple other instances where Congress has asked us to specifically target a couple of groups for deferred action. And I think it's the Real ID Act is an actual -- it's pretty significant indicia of Congressional intent in this area when they allowed but did not require a state to allow those in deferred action who have received deferred action to have proof of being lawfully present

for the purpose of state driver's licenses. And so there they actually incorporated the concept of deferred action as a category.

But, no, there's not a broader statute on point. And the reason why is that this is flowing from the prosecutorial discretion that's inherent in the --

THE COURT: I want to talk about discretion, but let me back into something, I guess --

MS. HARTNETT: Okay.

THE COURT: -- just to eliminate things. I mean, Mr. Oldham argued -- and I'm asking you this because I think you will agree with this -- is that if the APA applies and if the states have a ripe standing to sue under the APA, I mean, the injunction is good, isn't it? I mean, y'all haven't gone through the notes of the publication and comment procedure that would otherwise if the APA applies.

MS. HARTNETT: Well, there's one other step in the analysis that's separate from standing, and then there's *Heckler*, which is a broader point about any APA review. And then there's the question about what has to go through notice and comment. And that's covered by 5 U.S.C. 553(b), and we've covered this in our brief. This is the *Lincoln versus Vigil* case as well as the -- there's a Fifth Circuit case that's in the same vein called *Patients for Customized Care*.

And both of those cases stand for the proposition that if

the document or directive at issue from the agency is something that -- I'm quoting from *Lincoln*. Is something that advises the public prospectively in the manner -- of the manner in which the agency proposes to exercise a discretionary power, that that would be a general statement of policy that's exempt.

THE COURT: General guidance.

MS. HARTNETT: Right. So that -- that's a separate -- that would be regardless of whether it's like in the enforcement paradigm of *Heckler*, that would be the type of general policy guidance that would be immune from notice and comment.

THE COURT: Okay.

MS. HARTNETT: And it's important to note here that no -- no decisions have yet been made. That's -- I think that's -- the way to understand this is truly guidance and not something else is because the -- no applications have yet been taken. No decisions have been made. That is where -- that will be where agency decision making occurs.

THE COURT: Well, let's talk about that for a minute.

MS. HARTNETT: Yes.

THE COURT: I mean, the secretary has laid out six factors that one has to comply with to be eligible for this deferred action, right?

MS. HARTNETT: Yes, for the DAPA.

THE COURT: All right. And if I comply and fit into all those six factors, do I get DAPA?

MS. HARTNETT: Not necessarily.

THE COURT: And why is that?

MS. HARTNETT: I think that -- well, I'll start with the DAPA, and then I'll backtrack into one point about DACA. They made a slide that was not completely presented.

For DAPA, one of the six factors is that the alien presents no other -- I'm quoting from the -- what's Exhibit 7 to our opposition, but it's the November 20th memorandum about the deferred action. That the applicant must present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.

And then later in the memo --

THE COURT: And so, I mean, aren't you trying to find discretion by using discretion? I mean, if I -- if have a son or daughter that's a lawful permanent resident or U.S. citizen, I've been here since 2009, I'm physically present when they need to see, I haven't committed any crime, and you're telling me that the -- the agent on the street, the person processing this can turn him down? I mean, because, you know, there are a lot of probably people in this county that would want to know that if they comply with all the rules and regulations and they still get turned down?

MS. HARTNETT: Yes, Your Honor. And that's a consequence --

THE COURT: Has it happened in DACA?

MS. HARTNETT: It has, Your Honor.

THE COURT: All right. How many people has that happened to?

MS. HARTNETT: We have the exact numbers in our brief, but about six percent. This is not discretionary.

THE COURT: No, I want to know how many people not -- they fill out all the right forms, they pay all their money, they've done everything just the way the government has told them to do in DACA, and they've been turned down. How many?

MS. HARTNETT: I can't give you an exact number. I can tell you --

THE COURT: Have there been any?

MS. HARTNETT: Yes, there have.

THE COURT: How many?

MS. HARTNETT: Some -- we can provide -- we will be happy to address that issue in our --

THE COURT: And I want to know what they were turned down for.

MS. HARTNETT: I can tell you that some of it has to do with uncharged criminal conduct or criminal --

THE COURT: Then they didn't comply with the memo then.

MS. HARTNETT: They did comply with the memo, Your Honor. Your Honor, to be clear, this is a case-by-case adjudication by a duly empowered USCIS official. It's at a service center. They complained about that being not at the

local office. That's just exactly how the Valo (sic) ones are handled. That's how the U-visa ones are handled. This is not unique that they're doing it that way. And it's a feature of the program that they're trying to standardize it and make sure that it is a -- it is --

THE COURT: If it's standardized, it's not discretionary, is it?

MS. HARTNETT: It is both. It is simply both, Your Honor. It's to try to minimize the -- minimize the unfairness that would come from arbitrary denials, but at the same time ensure that there is a person --

THE COURT: I mean, the program itself is arbitrary, isn't it?

MS. HARTNETT: Not at all. That's a key -- that's a key factor.

THE COURT: Well, wait a minute. Let me -- let me -- have continuously resided in the United States since January 1, 2010. Why not January 1, 2009, or January 1, 2011?

MS. HARTNETT: I think Your Honor -- Your Honor, that's exactly the type of question I have to say the Court is not -- is not in the position to answer because it's not -- this is -- this is exactly the reason why, A, *Heckler* precludes the Court from looking at an enforcement policy. But even once you do get there, you have a general statement of enforcement policy here.

And the reasons that *Heckler* actually -- if the -- *Heckler*

is not itself an arbitrary decision. The reason why *Heckler* stands for the principle it does is that it recognizes that it's uniquely within the agency's judgment about matters such as resources, priorities, and its overall execution of the overall statutory scheme to determine what groups of people or what individual cases should be treated.

THE COURT: So if I'm an agent and I have Joe Blow come in off the street, and he has everything except he's only resided in the United States since January 31st of 2010 instead of January 1st of 2010, does he have the discretion to allow that person in?

MS. HARTNETT: He does actually, yes, more generally because there's always discretion to allow deferred action. But as a part of this program, I think the point of this is to not incentivize people to apply if they're not going to meet the general contours and have people be denied if there's not -- but the point is, yes --

THE COURT: Wait, wait, wait. Go back and answer my question.

MS. HARTNETT: Yes. Yes. The answer is yes.

THE COURT: Under this program, does the agent have discretion to say, no, January 1 is not magic. If you're here February 1, that's fine.

MS. HARTNETT: No, I think the discretion from that -- that -- and for this program. But whether the agent could then

grant --

THE COURT: And that's the root of my question. And it still may be prosecutorial discretion, and I'm not necessarily fussing with you on that. But hasn't the discretion already been exercised? Hasn't Secretary Johnson decided this is what the program is going to look like?

MS. HARTNETT: To a degree, yes. And there is actually nothing legally wrong with the secretary at a more top level making some judgments about --

THE COURT: I'm not -- I'm not fussing with you on that. But I'm --

MS. HARTNETT: But yes.

THE COURT: I mean, he's the one who's decided what the criteria are.

MS. HARTNETT: He has made -- he has taken some steps toward discretion, that is true. A lot of the major ones, by setting forth the criteria that are at issue in the program, I'm not going to dispute that some discretion is being implemented at that level, and that's not legally problematic. But what also comes through is that each of these criteria themselves include some discretion.

For example, the continuously resided. That's not -- that question is not itself always clear, so I would not say the January 1st is probably where the wiggle room there is. But I think there's going to be some question about continuously

resided in some cases.

And frankly the six criteria here is a real genuine duly issued criteria that provides for the individual officer's enforcement. And it's reinforced, lest it be viewed as just a bullet point that's kind of hidden among other things. Under the next page it says --

THE COURT: Tell me -- tell me what kind of investigation that's going to go into this.

MS. HARTNETT: I think that the DAPA -- this program, as the Court is aware, the memorandum directs the agency to have it stood up by no later than May, so it's still in the process of being stood up. I think that using the DACA experience, which we are happy to provide more information to the Court if it's useful, would be that --

THE COURT: I would like it.

MS. HARTNETT: Yes. We'll make sure we address that in our -- in our brief following the hearing. But there -- we -- there is actually a process that's set forth in the FAQs on the website and as part of the internal --

THE COURT: I'll read the FAQs.

MS. HARTNETT: And the directives where they -- the service center gets the application in the first place. If they have questions or need additional information, they can make those requests, and people at the field office level can do an interview if necessary.

THE COURT: But if I go through this checklist and I'm the -- I'm the agent on the street, the person that's having to interview this person, whether it's in a service center or wherever, I don't really care what building it's in, and someone comes in to me and I don't see any other factor, they haven't committed a felony or a misdemeanor with moral turpitude, they've been physically in the country on the date of the memorandum, and at the time of making the request they've continually resided in the United States before January 1st, 2010, and they have a son or a daughter who's a U.S. citizen or a legal permanent resident, do I have to give that person a deferred action card, if you will?

MS. HARTNETT: No.

THE COURT: So I can turn him down because they have red hair or because they're Irish; and like me, I think we have too many Irishmen here or for whatever reason?

MS. HARTNETT: Well, that -- those would be -- that would be probably -- the Irish part would be a probably improper reason for doing that. The red hair would be sounding somewhat arbitrary to me. But I think the point is I think the way the process is working currently, I believe, although we can confirm that in our brief, that those cases would be elevated to ensure that they were being -- that there was some reason.

But the reasons -- like, for example, I mean, these are -- and I had the fortune of seeing a -- you know, an outpost

yesterday. These are professionals who are trained to detect when there is a potential issue. And so it could be an indicia of potential gang affiliation from something that's being said in the emission. (sic)

THE COURT: How is that -- how is it -- tell me how this is saving money.

MS. HARTNETT: Well, I would make the point -- I was going to respond to the states' contention this is spending money. This is a self-funded endeavor. This will pay for itself. That's how it's been designed because it obviously would not really be worth it if we were spending all the money to do this.

THE COURT: So that Congress -- you're not going to have to reallocate any resources to it. Congress is not going to have to allocate any money to it. This is solely funded by the people that are applying for it?

MS. HARTNETT: It is designed to be funded by the fees that are going to be collected for it, yes.

THE COURT: And so what this really ought to do is free up ICE to really man the border now.

MS. HARTNETT: That's our point, Your Honor. Well, actually to also deal with internal removals. So there's a lot of -- there's that need for us at the border due to the Central American migration, but there's also a need to focus our enforcement in the -- in the interior. That's the point.

THE COURT: Well --

MS. HARTNETT: Also just one point just to flag an exhibit that was presented. I'm not sure if you -- this is page 595 of their appendix. And they put up something, a DACA form, and they said that -- that it basically was a check box and there was nowhere that discretion was even allowed under DACA.

There is one of the -- one of the several check boxes there talks about you don't otherwise warrant a favorable exercise because of national security or public safety concerns. And I think those are the types of -- that was the framework through which these --

THE COURT: Why didn't -- why didn't the secretary let all 11.3 million people, or at least that's the number that keeps getting thrown around. I don't know how we know how many illegal aliens are in the United States, but that's the number in the briefs. Why don't we just let them all in? That would really free up everybody to go enforce the border.

MS. HARTNETT: Your Honor, without -- I think the Secretary of the Homeland Security is trying his best to enforce the laws, the INA in a smart and effective manner. It seems hard to fathom how that would be smart or effective. I think what he's trying to do is remove. That would include, under your hypothetical, having people that are national security or public safety threats.

THE COURT: No, no. I meant using this criteria, why not all 11.3 million?

MS. HARTNETT: That's -- I mean, that's a decision that's frankly committed to the discretion of the agency to determine how to -- how to figure out what its priorities are. But what I --

THE COURT: Okay. So that's something that the -- according -- I mean, it's your position that if the secretary wanted to do that, he could do that.

MS. HARTNETT: To grant deferred action to everyone?

THE COURT: Yeah.

MS. HARTNETT: I -- it's hard to see -- I think that would be a much harder case. I think what they -- that's just not the case we have here where you have --

THE COURT: Why is that harder?

MS. HARTNETT: Well, I think -- why is it hard?

THE COURT: Why is it harder than these?

MS. HARTNETT: Well, deferred action needs to be informed. It's -- there's -- deferred action is not a free form concept that we can apply to anything and do whatever we want with. It's something that's informed by its past practice. The OLC opinion is helpful here. It sets forth factors that are to be kind of considered by the executive when -- in forming its use of its discretion. One of them is is what you're doing consistent with the overall statutory aim? And we -- is it

consistent --

THE COURT: The statutory aim is that if you're in the country illegally, you need to be deported.

MS. HARTNETT: Well, that's -- and that's an interesting point, Your Honor, because they have taken issue with us characterizing their view as somehow meaning that they have to deport everyone. That is exactly what page 3 of their PI motion says. They cited 8 U.S.C. 1225, and they said every person who is not presently legal shall be inspected; and if they're determined to be here or not clearly and beyond a doubt entitled to be admitted, they shall be detained for removal proceedings. So under their position, they want us to pick up everyone. That's just not possible.

THE COURT: I didn't say it was possible.

MS. HARTNETT: No, I know.

THE COURT: I'm not claiming that it's possible.

MS. HARTNETT: But I think it would be --

THE COURT: But it is what the statute says.

MS. HARTNETT: Well, I think we face a very different case if we had endless resources and the ability to remove 11 million people. We don't. But I also think that even -- even if that were the situation, you would -- of course, always still inherent in the enforcement of the law is some --

THE COURT: How is the government paying for all these training manuals and stuff they're coming up with right now?

There hasn't been any fees collected.

MS. HARTNETT: That's correct.

THE COURT: Well, so that aliens aren't paying for everything.

MS. HARTNETT: Well, they will. And I think the point is I don't have the -- I can -- we're happy to address the more -- the details of the USCIS budget. That's an agency that runs as a fee-funded agency.

THE COURT: Well, let me give you another -- let me give you a couple hypotheticals. Can -- one of the things that's committed to the discretion of the Executive Branch is the administration of the Civil Rights Act. Can the Attorney General or the Deputy of Homeland Security say: You know, we didn't get the funding we wanted. We don't have all the lawyers we need to go prosecute these people, so we're -- we're going to come up with a level of or a criteria for people that would otherwise be defendants under the Civil Rights Act, and we're not going to prosecute them.

So if you're, you know, native born in the United States and you want to go -- and you're over the age of 30 or whatever the criteria may be, and you want to, you know, violate somebody's civil rights, we're going to use our prosecutorial discretion not to enforce the Civil Rights Act as to you. And I lay out the whole system just like here. Can I do that?

MS. HARTNETT: Your Honor, I think it would depend on

how you -- that would be a system of prosecutorial discretion by an agency within a framework that is otherwise in charge of enforcement. I look to the *Adams versus Richardson* case which we cite in our brief. That was a case in which the courts found an abdication because that was a case in which Title 6 of the 1964 Civil Rights Act was essentially -- the agency determined that it simply would not enforce that. It would actively supply segregated institutions with federal funds.

And so the Court there made the point that if you're talking about discretion in the context of an otherwise effective enforcement program -- it was called the generally effective program, that would be one thing. In *Adams* you actually had -- that was not what you had. What you had was a decision just not to implement a certain statute in a certain context.

I think it's very clear here that we have -- a choice is being made about enforcement discretion in an otherwise generally effective program. And when I say that, I --

THE COURT: Wait, wait. Define generally effective program.

MS. HARTNETT: One that is removing as many people as possible with the money that we have and the resources we have. Every --

THE COURT: You're not wasting any resources?

MS. HARTNETT: We're trying to waste even fewer. And I think that the point is that the point -- it's never a waste, of

course, to try to execute the law properly. But I think the point being made is that we are -- that the agency is removing as many people as it can remove with the resources it has. It has a lot of other people left over. And how can it more effectively get to the worst of the ones to remove?

THE COURT: Let's do a simpler one. I'm -- you know, robbing a national bank is a federal crime. Wonder if I'm -- I'm the Attorney General, and I said: All right. We're no longer going to prosecute any bank robbers. People can rob banks at will. Can they do that?

MS. HARTNETT: If the federal --

THE COURT: If I'm the Attorney General and I say it's an exercise of my discretion. I'm not going to enforce bank robbery laws.

MS. HARTNETT: Again, I think the legal -- I mean, I think the legal -- yeah, I think the OLC opinion actually provide the place -- if that were ever to be proposed, which it clearly isn't, I think someone would have to look to the same factors that -- and the Executive Branch was deciding how are we going to behave here, we would look to the OLC opinion that we have here. And that was four principles about the permissible scope of enforcement discretion for an agency. Are the factors within the agency's expertise? Are the --

THE COURT: Okay. Well, that would be fine with bank robbers.

MS. HARTNETT: Is it consonant from the -- with the Congressional policies from the statutes at issue? Can the policy -- is the policy so extreme -- extreme as to be an abdication of the statutory duties?

THE COURT: Okay. And that's what you're hanging your hat on, I guess, is that would be that extreme?

MS. HARTNETT: I guess you would have to -- if everyone is just sitting around and the FBI agents were not doing anything other than -- but sitting around --

THE COURT: They're out capturing other bad guys.

MS. HARTNETT: I guess that would be part of the inquiry. And then finally it would say -- the OLC opinion also points out that it's most comfortably in this posture if you were doing a case-by-case review. It didn't find it necessary, but found it most comfortably there. And I think in your -- in the situation you're suggesting, it might not actually allow for that case-by-case review.

I'd also point out that as fanciful as the tax hypothetical the state was suggesting might be, the footnote 12 of the OLC opinion does note other places where the federal government has made -- made their -- some discreet examples where the government has said to certain subsets of potential antitrust violaters, potential tax violaters. And this is a -- the fugitive safe surrender program where someone might be actually in violation of the law but telling them please let us know, and

we will find a way to potentially not prosecute you or not enforce against you. So this is not -- this is not an un -- unprecedented --

THE COURT: But it's also not going to 4 million people.

MS. HARTNETT: Well, to be clear, that's the people that may be eligible for it, but the DACA numbers were lower in the end of the day than the four million.

I mean, the point -- the point overall being, though, that here it is -- it is undisputed that the agency simply does not have the resources to remove all the people in the country. And it's -- I believe it's undisputed that top priority should be national security threats, public safety threats and border -- recent border crossers. And the policies that are here today were designed to be both not impose a cost on those efforts, they're self-funded, and they're also --

THE COURT: If I'm sitting in my office in Denver, Colorado, wherever I am, and I'm an agent, and I don't have any national security people to go arrest right now, and I don't have any criminals to go arrest. Can I -- if I go and arrest or take into custody, however you want to phrase it, but can I go get someone that would fall under this program and have them deported?

MS. HARTNETT: I mean, I think a separate memo that was promulgated the same day as the general enforcement priorities memo, and so that sets forth the top priorities and --

THE COURT: I've gone down my priorities. I'm now down to priority four. Can I go do that?

MS. HARTNETT: Yes. I think the framework -- the frameworks that exist allow you to do that. I think the --

THE COURT: Okay. And so -- and this -- and the person I went and arrested would not have a, for lack of a better term, an affirmative defense that: Hey, wait a minute. I qualify under DAPA. I'm not a criminal. I've been here working my whole life, everything except I was not born here. I've got a kid that's a U.S. citizen. You know, I comply with all this, and I'm getting deported now because a guy worked through his priority list, and he got to me.

MS. HARTNETT: That person -- I mean, assuming that was an ICE agent, that he would -- the person he was encountering may not have been the USCIS which processes the DACA applications. I assume that person could try to still submit one and see what happens. But I think the more important point there is there's no right. These memoranda do not create a right for anyone.

THE COURT: Okay. That's not what I was asking you.

MS. HARTNETT: Right.

THE COURT: I was asking you would he be able to say: Wait a minute. Don't deport me. I qualify under DAPA?

MS. HARTNETT: No, sorry. I was trying to be responsive. It says that he would probably have a good like --

THE COURT: Well, I mean, I called it an affirmative defense. That was careless language.

MS. HARTNETT: Yeah. No, I just meant to say that he probably -- he might have a good point he can try to make to DHS and show why he may have some -- have not been -- if he -- if he was a -- somebody who should in his judgment not be captured by the way they're enforcing. On the other hand, he really has no right or ability to mount that argument in any legal way. He simply would be at the agency's discretion.

THE COURT: And is that going to be a -- is that going to be the agency's policy?

MS. HARTNETT: I think the agency's policy is from the top down to try its best to implement all the policies that were coming out on November 20th, and that included not only the deferred action, but the closely related, although independent and prosecutorial discretion, the border security initiates, and so --

THE COURT: Do I have an exhibit -- let me ask y'all from either side. I keep reading that there was ten November 20th memos. Is that right?

MS. HARTNETT: Yes.

THE COURT: Do I have all ten of them?

MS. HARTNETT: They may be here, and they may be not in one place. I think we've -- you know, that there's two that are most relevant. We can direct you to -- there's a website that

has them all. We can provide them all to the Court. Many of them don't --

THE COURT: Okay. I keep reading ten, and I only have two that I know of.

MS. HARTNETT: Yeah. The two that are most relevant are the deferred action and the prosecutorial discretion, but there are several others. And I think it's important, though, to see -- I mean, we -- I think the context is important because this is not just a -- this is a part of a consolidated effort to try the best the agency can with the authorities it has to focus. I mean, as you know from last summer, that was a troubling time, and there's been a -- an effort at the highest levels to make sure at the Department of Homeland Security that the border is being secured and that we're putting all the resources available to the border and to the removal of dangers to the nation. And this program here is both legally authorized and an important part of the overall picture of what the agency is trying to accomplish.

I guess at that, just turning, if you would like, to irreparable harm because that makes me --

THE COURT: Go ahead.

MS. HARTNETT: -- lead into it. You know, A, it's really their burden to -- the idea of -- the test is not should we preserve the status quo. It really is for a preliminary injunction, which is extraordinary relief, showing both

irreparable harm to the state as a state and showing a likelihood of success on the merits.

I think we set forth in our -- you know, we just discussed the likelihood of success on the merits, we discussed the failings in the states' claims of injury, which to the extent there is no injury, there is -- it follows that there would not be irreparable harm.

On the balance of the equities, again, I think I just go back to what I was talking about, which is the public interest is served by trying to most effectively enforce the immigration laws, and this is an important component of that. And so, you know, again, this, in the agency's judgment, will continue to advance the goal of helping to free up resources that are available to remove the threats to the nation and also to repel the recent entrants to the border.

As you know, one of the enforcement priorities is anyone who is a recent border crosser are at the utmost of our priorities. And so to that extent, the public interest would be served by allowing this to take effect.

But again, the true test here is have they established all four elements required for preliminary injunction, and the answer is no. And therefore, it should be denied.

On the scope of the relief, I guess I would ask, although we don't think any injunction should be granted, that we just for the first time this morning seen the proposed injunction, and we

would like an opportunity to respond to that.

THE COURT: Well, let's -- before we do that, any reply, Mr. Oldham?

MR. OLDHAM: Yes, Your Honor.

THE COURT: Let me ask a question. And it's outside the record, but just my own curiosity. Yesterday the house voted -- what did they vote? Not to fund this?

MR. OLDHAM: I saw the news stories, Your Honor, but I'm not familiar with the particulars.

THE COURT: I mean, I'm a little confused. If it's self funding, why does it matter if the house votes?

MR. OLDHAM: As I say, Your Honor, I'm not exactly familiar with what the house did yesterday. I do -- I am familiar with two facts, though. One is that the house did vote overwhelmingly to repudiate the lawfulness of the November 20th directives. And the bill that the house passed to that effect is included in our appendix materials.

And the second is that the USCIS union president, Kenny Palinkas, whose declaration is in the plaintiffs' reply materials as well, says that there's actually -- that they're granting fee waivers for the -- for the fee applications. So it's not clear to us either how it's self funding.

And perhaps a third point is that even if they weren't granting fee waivers and even if they were requiring people to pay 400-some-odd dollars for the applications, it's just simply

not true that they're not diverting resources away from other parts of USCIS because that's documented in emails that are attached to the plaintiffs' reply brief.

So, and those --

THE COURT: That doesn't really have much to do with this case. I was just curious to why it was a big deal. If it was going to be self funding, they could keep all their money.

MR. OLDHAM: Yes, Your Honor.

THE COURT: Go ahead. You wanted to reply to comments of Ms. Hartnett.

MR. OLDHAM: Sure. Very quickly, just two points to the Take Care Clause and then three to the APA.

The first on the Take Care Clause, we heard again from the -- from the government that they have this sort of broad reaching delegations of authority and then sort of the principal provisions of the INA that gives them the ability just to dispense with all of the other provisions of the statute and to just execute as they see fit, and that could include creating new government programs to dole out benefits to formally enroll, as Your Honor asked, perhaps 11 million.

THE COURT: That happens all the time, doesn't it? I mean, I'm not being facetious, but Congress passes stuff, and agencies come up with new programs all the time that pass out benefits.

MR. OLDHAM: Well, Your Honor, that would be very --

you're absolutely right, and that's why I want to be very clear about what the complaint is and what the facts and law are.

The complaint is not that they have -- that they have broad discretion to decide how to set enforcement priorities and to set -- you know, and decide who gets removed and who doesn't. The complaint is that Congress does not hide elephants in mouse holes. And what I mean by that is that Congress would not use a provision like "The secretary shall enforce the provisions of the INA" and then bury underneath of it some capacious delegation to say what really what we mean by that is we're getting ready to give you 500 provisions of statutory text -- 500 pages of statutory text, but you really don't have to follow any of it. You can just literally ignore all of it and make up your own rules.

And that is just -- that is a fundamental principle of statutory interpretation. It's a fundamental principle of administrative law. And the -- we pointed this out, and we have not heard a response from the United States today as to how it could possibly be that some generalized description about enforcement authority at the beginning of the INA can render superfluous really all of the rest that comes after it as applied to 40 percent or 100 percent of the undocumented population.

And on that fact, with the Court's indulgence, we have printed up copies of the relevant provisions with respect to

work authorizations. These were the provisions that were cited in the slide earlier today. I have two for the Court, if I might hand them up.

THE COURT: Just hand them to Cristi.

MR. OLDHAM: And we've highlighted the provisions in Title 8 that authorize the Attorney General or now the Secretary of the Department of Homeland Security to grant work authorizations, and there are several of them. There are many of them. And they imply -- and they include lots of temporary protected statuses and temporary -- and other temporary statuses under the immigration laws; for example, T visas and U visas and a lot of the precedents we've talked about.

I think what the Department of Justice is arguing to the Court and the proposition that they would like this case to stand for is that even though Congress has passed all of these statutory provisions and said here are the circumstances where you can grant work authorization, all of this, everything I just handed you is complete surplusage because really the thing that's doing the work is the general provision at the beginning of the statute that says, "You shall enforce the law." And you don't have to follow any of these. These aren't restrictions.

These are just like: We would like you to give out work authorizations in these circumstances, but we don't mean this to be an exclusive -- exclusive of your opportunity to give out work authorizations to literally everyone. Literally everyone

in the United States is their view, and that just can't possibly be. The Supreme Court has rejected that time and time again, both with respect to just general statutory interpretation principles, but also in particular with respect to administrative law. That is not how agencies faithfully interpret their laws or promulgate regulations underneath of it.

The second I think Take Care argument is we've heard yet again about the *Heckler versus Chaney* case. And our friends from the Justice Department have said: Oh, well, if you look at the OLC memo, the OLC memo is so helpful.

And we agree actually that there are portions of the OLC -- we think it obviously gets the answer wrong on the merits. But we have quoted a provision of the OLC memo that I believe Ms. Hartnett misunderstood, misinterpreted earlier this morning. And it's quoted in full on page 28 of the plaintiffs' reply brief.

And it says, "According to OLC, it is, quote, critical to the legality of deferred action programs that they rely on genuine case-by-case discretion rather than" -- and this is the key language, "rather than granting deferred action automatically to all applicants who satisfy the threshold eligibility criteria."

Critical. It's absolutely critical, according to OLC, that it's genuine case by case and not rote application of the eligibility criteria. So Your Honor says to Ms. Hartnett or

asks to Ms. Hartnett, "So can you provide an example of a person who has been denied, after meeting all of the eligibility criteria, meets all the eligibility criteria, and yet gets denied?"

You are not the first person to ask for that information. Congress has been pressing the Department of Homeland Security for that information for years, and we've included that correspondence in the reply brief. I'm sorry, as an attachment to the reply brief. And they have pointed to no case. No case.

They've been doing this now for two years. They've granted hundreds of thousands of these under DACA using the same idea. This is OLC talking about the legality of the DACA program. The DHS was told it was critical to do it case by case, critical to do more than simply apply the eligibility criteria, and they didn't do it. Or at least they haven't been able to show anybody that they did, and that Congress has been asking for years.

So I think we agree that OLC -- you know, that it is critical that it be genuine case by case. We do agree that it not be rote application of the eligibility criteria. We agree that if they really want to make this sound like it's not -- like it's *Heckler versus Chaney* and they're making these sort of individualized determinations, it cannot be like Bill Gates applying for Medicaid, right? It can't be that the people that they point to for their denials, their 5 percent or .5 percent

or whatever the number is that's been denied is simply because, well, you know, they don't have a child who is here or they got here too late or they don't -- they didn't sign the form correctly or they didn't pay the application fee.

Turning to the APA, they say again, well, this is just general policy guidance. This is like the *Vigil* case or the *Prof'ls versus Patient* -- *Prof'ls* and -- *Professionals and Patients* case. And they can point to no case. It's certainly not *Professionals and Patients.* It's certainly not *Vigil*. And it's certainly no case that I've seen from the D.C. Circuit, the Fifth Circuit or any other court of appeals that has interpreted administrative law principles that has said that it is merely a guidance document; that it is merely just a preparatory statement of general advisement to the public that looks like the one we showed you today that says, "I direct, you shall, you shall not, you may, you may not," over and over and over again.

And I think one of those is particularly -- I want to call this to the Court's attention too because it goes to the hypothetical that the Court asked about, the hypothesized ICE agent in his office in Denver, Colorado. So I get through -- I go through all of my priorities. I get all the way down to the bottom, and I decide I'm going to go look for somebody who may qualify for DAPA.

In fact, that hypothesized ICE agent never even gets that far because the directive specifically says that ICE is

instructed to review pending removal cases and seek administrative closure or termination of those cases, right? So even if you went out and found a person and said: Oh, well, you know, I've gotten all the way. I didn't have any, you know, drug dealers or other criminals or other things. I got all the way to my lowest priority cases and you're it. Sorry.

THE COURT: If you find somebody who doesn't have any drug dealers, they're welcome to come down here.

MR. OLDHAM: But even in the hypothetical ICE agent example, he never even gets that far. And the reason he doesn't get that far is precisely because this document, this DHS directive that they promulgated unilaterally and they desperately want to shield from any amount of judicial review commands, directs and speaks with authoritative instruction to ICE agents across the country. And because it does that, under *Vigil, Professionals and Patients, Appalachian Power,* and unrefuted line of cases that we have offered in both of our preliminary injunction papers, it has to comply with the APA.

So you said well, what about arbitrary decision making? What about -- what if -- you know, it says this date. Why couldn't it have been a day earlier or a year earlier or a year later? Well, what if -- what if the Department of Homeland Security wanted to deny an application, even though it met all the eligibility criteria, but they wanted to deny it because the applicant had red hair?

The most important part, if we could leave the Court with only this, is that the Justice Department wants you to say the proposition that is going to be embodied in this case in their view is that even that is not subject to judicial review.

All right. So Ms. Hartnett says, oh, well, that sounds arbitrary. But, of course, the whole proposition that the Justice Department has put forward here is that no one of these cases is subject to judicial review ever.

So even if it was pernicious, even it if was discriminatory, and even if it was arbitrary, it would be clouded -- it would be shrouded from judicial review under their theory. And it is vital, vital, vital, vital to say that the entire point of the Administrative Procedure Act is to make those arbitrary government decisions, whether it's picking a date or whether it's selecting a category of people and saying these are the people that we're going to just give out government benefits to, is to make those nonarbitrary, to allow people to see them, to allow people to comment and to force Executive Branch agencies to reconcile their views about what they would like to do with the levers of governmental power, with the statute that Congress dually enacted.

We would ask the preliminary injunction be issued.

THE COURT: Okay. Let's do our housekeeping. Mr. Oldham, you had, as I understand, another state wishing to join?

MR. OLDHAM: Yes, Your Honor. We wanted to advise on the record -- and we're not sure exactly how the Court and the Department of Justice would like us to handle this. But after we filed the preliminary injunction motion, the State of Tennessee, through its Attorney General, noticed us of its intent to join the lawsuit as an additional party plaintiff. So we did not want to interrupt the preliminary injunction proceedings by amending and then having a new amended PI and et cetera, so we talked to them and conferred with them to make sure they were comfortable and told them that we would -- we would raise it with you. So we're happy to file a new complaint and make the PI apply to it, whatever would be of convenience.

THE COURT: Ms. Hartnett, what's the -- what's your druthers? I mean, I don't see any reason to make them file a new complaint. If they just want to file a supplemental pleading that says "me too" by Tennessee if that's all they're doing. If they're going to raise something new, then I want to -- that's a different sorry.

MS. HARTNETT: Your Honor, I think we would agree in general. I think the point would be that in order to -- they would have to show harm obviously to be a proper plaintiff and then as far as any -- not that we're going to get to the point of any kind of injunctive relief, but we would just want to make clear that, you know, they would have to make whatever showings are required, and we would want to respond to anything they

filed that would be Tennessee specific.

THE COURT: All right. Why don't you file a supplemental complaint so you don't have to amend your whole complaint and just add Tennessee. If you'll do that by next Friday, the 23rd. And then if the government, if you feel any need to add anything to your answer, you can have until the next Friday, the 30th. I mean, I don't see this as being -- unless you're going to tell me that there's something different about Tennessee. I mean, the way I look at it, you know, they either just hitched a ride on the, you know, Queen Elizabeth or the Titanic, depending on how I rule.

But, you know, as far as you know, Mr. Oldham, they don't have anything unique or unusual about their position?

MR. OLDHAM: As I -- as I stand here today, I'm unaware that they would have anything in addition to the three bases we've heard.

THE COURT: All right. If something comes up then, let's -- we'll revisit it. But right now if you'll just file a supplemental complaint joining Tennessee by the 23rd, and the government can file a supplemental answer, to the extent they need it, by the 30th.

MR. OLDHAM: Yes, Your Honor.

THE COURT: All right. That takes care of your problem. Now let's talk about yours.

MS. HARTNETT: Okay.

THE COURT: I'm a little concerned about how much time you asked for. If I give you until the 28th, can you work with that?

MS. HARTNETT: Let me confer with my co-counsel, but I believe so.

Your Honor, in part we're just discussing about the need to respond to some of the voluminous factual material. If we could have until the 30th, that Friday, that would be preferable.

THE COURT: Okay. And then what is the -- I guess to preempt Mr. Oldham when I ask him does he have any problem with that, he's going to want to know what's happening when?

MS. HARTNETT: And we set this -- we did file yesterday afternoon, Your Honor.

THE COURT: I can't find it.

MS. HARTNETT: My apologies.

THE COURT: No, no. It's here. I just buried it with all my paper.

MS. HARTNETT: In that document we reiterated that no applications for the revised DACA -- this is not even DAPA -- revised DACA would be accepted until the 18th of February, and that no action would be taken on any of those applications until March the 4th.

THE COURT: And nothing is happening on DAPA?

MS. HARTNETT: So the memorandum said that DAPA should be implemented no sooner than mid May, so DACA is really the

first -- the revised DACA is the first deadline.

THE COURT: Okay. Then you can have until the 30th.

MS. HARTNETT: Okay. Thank you.

THE COURT: Wait, wait. You're being flagged.

MS. HARTNETT: Oh, sorry. Just to be clear, I meant no later than. So the memorandum provides that by mid May, DAPA will be stood up.

THE COURT: Okay.

MS. HARTNETT: But the main -- the driver here would be --

THE COURT: But as far as you know, nothing is going to happen in the next three weeks?

MS. HARTNETT: No, Your Honor.

THE COURT: Okay. On either.

MS. HARTNETT: In terms of accepting applications or granting any up or down applications.

THE COURT: Okay.

MS. HARTNETT: For revised DACA, just to be totally clear.

THE COURT: All right. Let me talk about ruling on this. I'm going to rule as soon as I can. Now, that's -- I guess every judge says that, but both y'all know I have a substantial criminal docket. And both of you, if you didn't know before, you know now that we're one judge short down here. So we're awaiting confirmation hopefully of some help coming,

but -- so those are my constraints, so I'm dealing with a more than usual criminal docket and the civil docket as well.

So I will try to rule as expeditiously as I can. Obviously I'm not going to do anything before the 30th when y'all file your brief.

If there becomes a problem with the addition of Tennessee, what I would like you to do, Ms. Hartnett, is write the Court a letter. Normally I don't do it this way. I mean, it's -- file it. I mean, it's going to be filed. It's not a private correspondence or anything. But write a letter, copy the state, and tell me what the problem is so I can figure it out, and we'll probably just have a phone hearing to resolve whatever we do with that. Otherwise, you know, you can just file your answer by the end of the month.

MS. HARTNETT: Yes, Your Honor. If they simply add Tennessee like they did with the states that didn't have any additional factual submissions, we would assume there would be no problem.

THE COURT: And that's what I'm assuming at the moment too.

MS. HARTNETT: Yes.

THE COURT: So I'm granting the addition of Tennessee kind of with that understanding.

MS. HARTNETT: Thank you.

THE COURT: All right. Anything else we need to cover?

MR. OLDHAM: Your Honor, we have a -- I just want to explain the states' concerns on timing. It's not related to Tennessee. It's related to giving the Justice Department until the 30th of January to file a supplemental pleading in this case.

And the concern that we have is that they have told us that they will start accepting applications and standing up this program on the 18th of February. And if they file -- and I should also say they have not told us what they -- what exactly the need for this filing is at the end of this month. So we don't know if it's simply --

THE COURT: Well, they want to reply to your reply, which I'm okay with. We had some additional things come up during the hearing that they want to reply to.

MR. OLDHAM: Oh, and that's certainly -- we certainly don't begrudge that. What we're concerned about is that if they introduce additional factual information in a surreply, then we may need the opportunity for an evidentiary hearing.

THE COURT: In that case you can send me a letter and copy Ms. Hartnett.

MR. OLDHAM: Well, yes, Your Honor.

THE COURT: And we'll resolve that by phonecall.

MS. HARTNETT: I would just add, much of the material that was submitted in the reply could have been submitted in the initial motion. They're the typical types of, you know,

declarations purporting to establish standing for preliminary injunction purposes. But we will try to streamline our -- we will try to streamline our response on the 30th to the extent possible.

THE COURT: Okay.

MR. OLDHAM: We just want to be sure that with them filing on the 30th, if we need to have an evidentiary hearing to cross-examine declarants to do additional fact finding to be right back here where we started, that we'll have an opportunity to do that in a way that would still preserve our rights to have a resolution of it before the program goes into effect.

THE COURT: If anybody thinks there's going to have to be an evidentiary hearing of any kind, that's something I need to know ASAP. Because I was operating on the assumption from the phonecall we had that that was not going to be necessary and that both sides had agreed to that.

MR. OLDHAM: And it's certainly our view as we sit here today that there is no need for it. But what I'm concerned about --

THE COURT: You're covering your bases, and I'm okay with that. We'll cross that bridge when we get to it. But for right now, let's leave it like that.

All right then. Anything else? Thank y'all for being here.

MR. OLDHAM: Thank you, Your Honor.

MS. HARTNETT: Thank you, Your Honor.

(Court adjourned.)

* * *

(End of requested transcript)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: January 20, 2015

/s/_____
Signature of Court Reporter
Barbara Barnard